

(28,038)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 681.

VICTOR E. SHWAB, EXECUTOR OF THE LAST WILL AND
TESTAMENT OF AUGUSTA J. DICKEL, DECEASED,
PLAINTIFF IN ERROR,

vs.

EMANUEL J. DOYLE, UNITED STATES COLLECTOR OF IN-
TERNAL REVENUE FOR THE FOURTH COLLECTION
DISTRICT OF MICHIGAN.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

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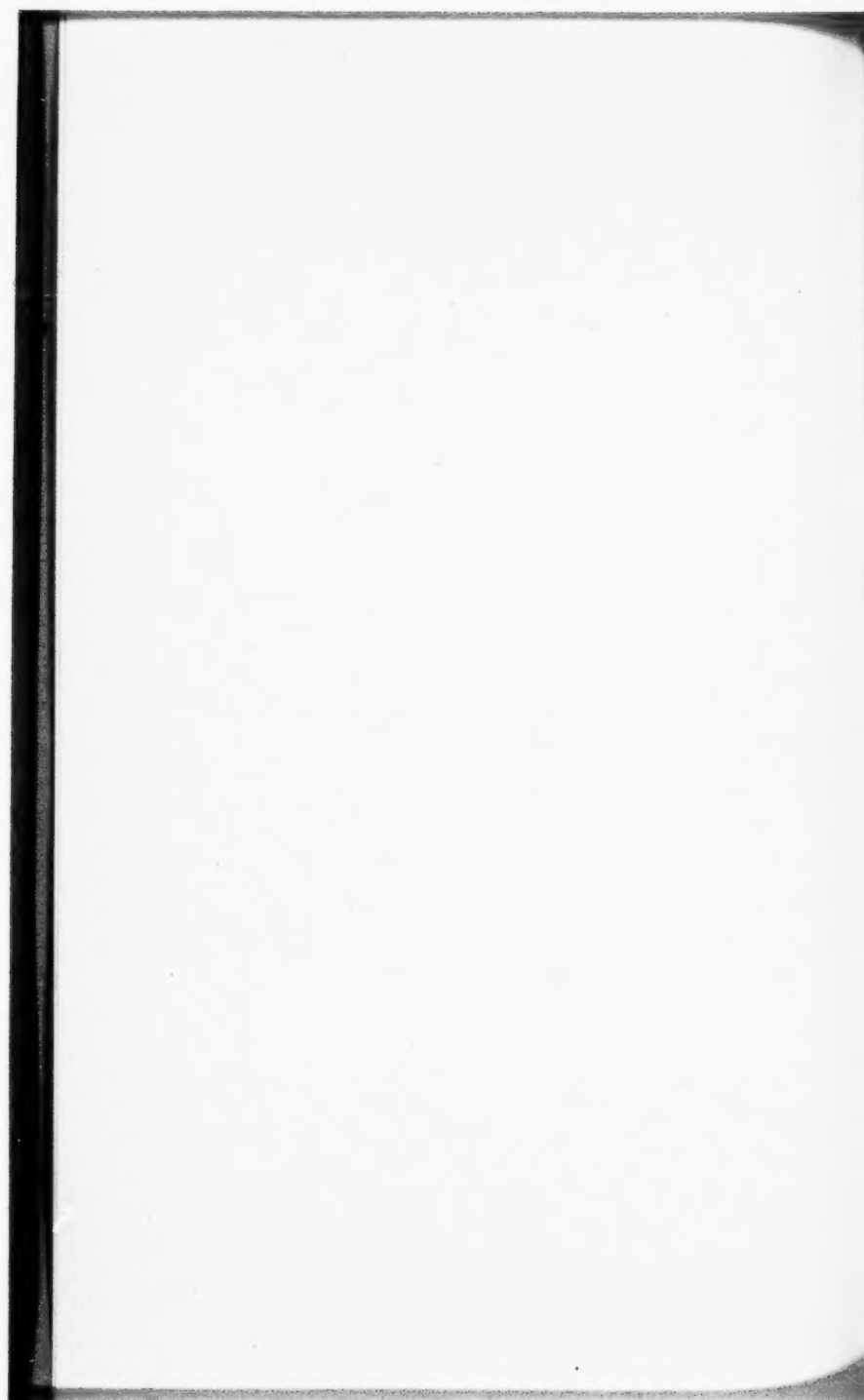
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No. 3364.

**United States Circuit
Court of Appeals
Sixth Circuit**

VICTOR E. SHWAB, EXECUTOR OF THE LAST
WILL AND TESTAMENT OF AUGUSTA J.
DICKEL, DECEASED,

Plaintiff in Error,

vs.

EMANUEL J. DOYLE, UNITED STATES COL-
LECTOR OF INTERNAL REVENUE FOR THE
FOURTH COLLECTION DISTRICT OF MICHIGAN,

Defendant in Error.

Error to the District Court of the United States for the
Western District of Michigan, Southern Division.

TRANSCRIPT OF RECORD.

Original Transcript Filed November 29, 1919.



TRANSCRIPT OF RECORD

DECLARATION—Filed July 31, 1918.

In the District Court of the United States for the Western District of Michigan, Southern Division.

Victor E. Shwab, Executor of the Last Will and Testament of Augusta Dickel, Deceased,

Plaintiff,

vs.

Emanuel J. Doyle, United States Collector of Internal Revenue for the Fourth Collection District of Michigan, Defendant.

To Emanuel J. Doyle, United States Collector of Internal Revenue for the Fourth Collection District of Michigan, the Above Named Defendant:

You are hereby notified that a suit has been commenced against you, as defendant, by Victor E. Shwab, executor of the last will and testament of Augusta Dickel, deceased, as plaintiff, and that the within is a true copy of plaintiff's declaration in said cause, and that if you desire to defend the same you are required to plead thereto within fifteen (15) days after service upon you of a copy of said declaration.

Dated July 30, 1918.

Willard F. Keeney,
Butterfield & Keeney,
Attorneys for Plaintiff.
John J. Vertrees,
Of Counsel.

Business Address: 503-506½ Michigan Trust Building, Grand Rapids, Mich.

Victor E. Shwab, Executor of the last will and testament of Augusta Dickel, deceased, plaintiff, by Willard F. Keeney and Butterfield & Keeney, his attorneys, complains of Emanuel J. Doyle, United States Collector of Internal Revenue for the Fourth Collection District of Michigan, of a plea of trespass on the case upon prom-

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ises, filing his declaration and rule to plead as commencement of suit, pursuant to the statute in such case made and provided.

For that whereas the plaintiff heretofore, to wit, on the first day of April, 1915, was, thence hitherto has been, and still is a citizen of the State of Tennessee and a resident of the County of Davidson in said State.

And defendand on the first day of April, 1915, was thence hitherto has been, and still is a citizen of the State of Michigan, a resident of the City of Grand Rapids, County of Kent, in said district and division of Michigan, and Collector of Internal Revenue of the United States of America for the Fourth Collection District of Michigan.

And plaintiff saith that one Augusta Dickel on, to-wit, the first day of April, 1915, and thence until the date of her death, was a citizen of the State of Michigan, and a resident of the City of Charlevoix, County of Charlevoix, in said district and division of Michigan, and said Augusta Dickel died on, to-wit, the sixteenth day of September, 1916, leaving a last will and testament, in which Victor E. Shwab, the plaintiff herein, was appointed and named executor.

And plaintiff further saith that after the death of said Augusta Dickel her last will and testament was duly probated in the Probate Court for said County of Charlevoix, and said Victor E. Shwab, the plaintiff herein, was duly appointed executor thereof by said Probate Court, and thereafter and on, to-wit, the eighteenth day of October, 1916, duly qualified as such executor and thence hitherto has been, and still is, the executor thereof.

And plaintiff further saith that, as executor of said last will and testament of said Augusta Dickel, deceased, he was subject to and liable to pay to the United States of America the estate tax imposed upon him by Title II of the Act of Congress of the United States, entitled "An Act to Increase the Revenue and for Other Purposes," approved September 8, 1916, which tax was imposed upon the transfer of the net estate, the value of which was to be determined as provided in said Act, of every decedent dying after the passage of said Act, said tax being equal to the following percentages of the value of said net estate:

One percentum of the amount of such net estate not in excess of Fifty Thousand (\$50,000) Dollars;

Two percentum of the amount by which such net estate exceeds Fifty Thousand (\$50,000) Dollars and

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does not exceed One Hundred Fifty Thousand (\$150,000) Dollars;

Three per centum of the amount by which such net estate exceeds One Hundred Fifty Thousand (\$150,000) Dollars and does not exceed Two Hundred Fifty Thousand (\$250,000) Dollars;

Four per centum of the amount by which such net estate exceeds Two Hundred Fifty Thousand (\$250,000) Dollars and does not exceed Four Hundred Fifty Thousand (\$450,000) Dollars;

Five per centum of the amount by which such net estate exceeds Four Hundred Fifty Thousand (\$450,000) Dollars and does not exceed One Million (\$1,000,000) Dollars;

Six per centum of the amount by which such net estate exceeds One Million (\$1,000,000) Dollars and does not exceed Two Million (\$2,000,000) Dollars.

And, being so liable, plaintiff, as Executor, as aforesaid, made and delivered to the defendant, United States Collector of Internal Revenue for the Fourth Collection District of Michigan, within the time and in the manner and form required by the Act aforesaid, a true and correct return of the value of the entire gross estate of said Augusta Dickel, the deductions allowed under said Act, the value of the entire net estate of said decedent, and the tax payable thereon, computed and in said return stated and set forth in accordance with the said Act and the rules and regulations of the Treasury Department of the United States of America in that behalf provided, which return was, as thereafter adjusted by the United States Commissioner of Internal Revenue, in so far as said adjustment was consented to by plaintiff, in the aggregate as follows:

Gross Estate	\$855,596.39
Deductions	50,754.15

Net Estate, subject to the tax.....	\$804,842.24
Tax payable	\$31,242.12

That thereafter the Commissioner of Internal Revenue of the United States of America, in manner and form as by law required, assessed said estate tax against plaintiff in the amount of Thirty-one Thousand and Two Hundred Forty-two and 12/100 (\$31,242.12) Dollars, which amount so assessed plaintiff thereafter paid to the defendant, the Collector of Internal Revenue for the Fourth Collection District of Michigan, at the time when the

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same became due and payable, pursuant to the Act of Congress aforesaid.

And the plaintiff further saith that on or about, to-wit, April 21, 1915, said Augusta Dickel in her lifetime entered into and executed with the Detroit Trust Company, a corporation organized and existing under the laws of the State of Michigan, with its principal office for the transaction of business in the City of Detroit, in said State, a certain trust agreement, a true copy of which is hereto attached and marked Exhibit "A" and made a part hereof. By said trust agreement said Augusta Dickel made an absolute and irrevocable transfer of certain property therein particularly described, to said Detroit Trust Company, in trust for certain purposes and the benefit of certain persons therein fully mentioned and set forth. In said trust agreement said Augusta Dickel reserved no interest or control for herself, or right of revocation whatsoever, and the same took immediate effect from and after the date of its execution. Said Detroit Trust Company, from and after said date, and long prior to the death of said Augusta Dickel took possession of said property, entered into the performance of its duties as such trustee, and made such payments to the beneficiaries as said agreement, by its terms required, and said beneficiaries accepted the benefit thereof. Said trust agreement was not entered into or created, nor was said transfer made by said Augusta Dickel in contemplation of or intended to take effect in possession or enjoyment at or after her death. Said trust agreement and the transfer thereby made created forthwith at the date thereof, an absolute vested estate and interest in said Detroit Trust Company and said beneficiaries of said trust.

And plaintiff further saith that, in making his return as aforesaid, he did not and was not required, by said Act to include therein as part of the estate of said Augusta Dickel, deceased, and subject to the estate tax imposed by said Act of Congress, the said property transferred by said Augusta Dickel; that said property was not subject to said estate tax for the reasons that it was not part of the gross or net estate of said Augusta Dickel, deceased, as defined in said Act, and was not covered by the terms of said Act approved long after said transfer was made and said trust agreement was executed, and said Act of Congress, if the same did purport to cover said transfer and trust agreement, is to that ex-

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tent unconstitutional and void, which reasons are more fully set forth in the letter of protest and appeal to the United States Commissioner of Internal Revenue, hereinafter mentioned and made a part hereof; and that the plaintiff made said payment of the estate tax aforesaid on the basis of the return aforesaid, which did not include the value of said property, transferred as aforesaid, by said trust agreement.

And plaintiff further saith that in the year 1917, on or about, to wit, December 1, 1917, the United States Commissioner of Internal Revenue assessed plaintiff, as executor of the last will and testament of Augusta Dickel, deceased, an additional estate tax upon said estate, alleging the same to be assessed under the Act of Congress aforesaid, as follows: the sum of \$56,548.41, being a tax upon the value of said property transferred in said trust agreement by said Augusta Dickel during her lifetime, which property was alleged to be of the value of \$975,000 and which transfer was alleged to have been made by said Augusta Dickel in contemplation of death, and to be a part of her estate within the meaning of section 202, paragraph (b) of the Act of Congress, aforesaid; and upon which amount of \$975,000 no estate tax had previously been assessed; and that therefore there was alleged to be due the United States from plaintiff, as executor as aforesaid, as an additional estate tax on said estate, the said sum of \$56,548.41, so assessed.

And on, to wit, December 7, 1917, the United States Collector of Internal Revenue for the Fourth Collection District of Michigan, aforesaid, the defendant herein, demanded of the plaintiff as executor as aforesaid, the payment of the additional tax aforesaid and threatened if the same was not paid to enforce the collection thereof with the penalties and interest by the said Act of Congress provided, in manner and form as by law provided.

And thereupon, in order to prevent the accruing of penalties and interest and distraint of plaintiff's property, plaintiff on, to-wit, December 15, 1917, paid to the said defendant, the United States Collector of Internal Revenue for the Fourth Collection District of Michigan, the sum of \$56,548.41, being the amount of the additional income tax assessed as aforesaid, under protest, which protest was made orally and also in the letter of date December 14, 1917, a true copy of which is hereto attached and marked Exhibit "B," and made a part hereof, and which letter was presented to said defendant prior to the

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payment aforesaid. Upon said payment being made, the defendant, the United States Collector of Internal Revenue as aforesaid, gave to plaintiff a receipt therefor, bearing upon its face the notation "Paid under protest."

And shortly thereafter, and on, to-wit, December 21, 1917, plaintiff, as executor as aforesaid, caused an appeal for the refunding of said sum of \$56,548.41 and the several and respective items thereof, to be made to the United States Commissioner of Internal Revenue, in manner and form as provided in section 3226 of the Revised Statutes of the United States, the provisions of law in that regard, and the regulations of the Secretary of the Treasury in pursuance thereof, a true copy of which appeal is hereto attached and marked Exhibit "C" and made a part hereof.

And plaintiff further says that more than six months have elapsed since the making by plaintiff of said appeal for the refunding of said sum of \$56,548.41, and that the said United States Commissioner of Internal Revenue, on or about, to wit, May 27, 1918, refused, rejected and denied said appeal, and the sum aforesaid has not been to plaintiff refunded.

Whereby, by reason of the premises and the statutes of the United States in such case made and provided, plaintiff, as executor as aforesaid, became and was entitled to demand from defendant, and defendant became and was liable to pay to plaintiff, the said sum of \$56,548.41 and interest thereon, when he, the defendant, should be thereunto requested, and the defendant, being so liable and being so requested, on, to wit, June 24, 1918, promised to pay the plaintiff said sum.

Common Counts.

For that whereas also the said defendant heretofore, to-wit, on the 24th day of June, 1918, at, to-wit, the City of Grand Rapids, in said District and Division of Michigan, was indebted to said plaintiff in the further sum of \$56,548.41 and interest thereon from and after, to-wit, the 21st day of December, 1917, legal money of the United States, for the price and value of goods then and there sold and transferred by the plaintiff to the defendant at his request.

And in a like sum for the price of value of work then and there done and material for the same provided by the plaintiff for the defendant at his request.

And in a like sum of money then and there paid by

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the plaintiff for the use of the defendant at his request.

And in a like sum of money then and there received by the defendant for the use of the plaintiff.

And in a like sum for money then and there found to be due from the defendant to the plaintiff on an account stated between them.

And being so indebted, the said defendant, in consideration thereof, then and there promised the plaintiff to pay him the said several sums of money on request.

Nevertheless, the said defendant (although often afterwards requested so to do), hath not as yet paid the several sums of money above mentioned, or any of them, or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendant hath hitherto altogether refused and neglected; and still doth refuse and neglect to the damage of said plaintiff Seventy-five Thousand (\$75,000) Dollars, and therefore the said plaintiff brings his suit.

Willard F. Keeney,
Buttfield & Keeney,
Attorneys for Plaintiff.
John J. Vertrees,

Of Counsel.

Business Address: 503-506½ Michigan Trust Bldg.,
Grand Rapids, Michigan.

Exhibit "A."

This instrument made and entered into this the twenty-first day of April, 1915, by and between Mrs. Augusta Dickel of Charlevoix, Michigan, party of the first part, and hereinafter for brevity sometimes referred to as "Mrs. Dickel," and the Detroit Trust Company, a corporation organized and existing under the laws of the State of Michigan, party of the second part, and hereinafter sometimes referred to as "The Company," witnesseth:

Whereas Mrs. Dickel is the owner of the securities hereinafter more particularly described, carrying at their face or par value the principal sum of one million dollars; and

Whereas she desires to make a division of the part of her estate particularly described herein, subject, however, to the terms, conditions, limitations and restrictions hereinafter expressed; now

Therefore, in consideration of mutual benefits to the parties hereto and of the covenants and agreements of The Company to be performed, Augusta Dickel hereby

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assigns, transfers, sets over and delivers unto Detroit Trust Company the stocks and bonds, or securities hereinafter described, with all their unmatured coupons and the proceeds to be derived therefrom, both principal and income, in trust, however, for the term and purpose, with all the powers and authorities, and subject to the conditions and limitations hereinafter stated. The said securities so assigned, more particularly described, are as follows:

Interborough Rapid Transit Co., N. Y. First & Refunding mortgage 5% bonds, dated January 1, 1913, due January 1, 1966.

25 Numbers 50370 to 50394, inclusive.

10 Numbers 50275 to 50284, inclusive.

35, each \$1000.....\$35,000.00
Kansas City Terminal Railroad Co. First Mortgage 4% bonds, dated January 3, 1910, due January 1, 1960, Numbers 39437 to 39486, inclusive,

50, each \$1000.....\$50,000.00
Lexington & Eastern Railway Co. First Mortgage 5% bonds, dated April 1, 1915, due April 1, 1965.

50, each \$1000.....\$50,000.00
Chicago, Milwaukee & St. Paul Ry. Co. General and Refunding Mortgage Gold 5% bonds, dated February 1, 1915, due February 1, 2014.

104, each \$1000.....\$104,000.00
Indianapolis Union Railway General & Refunding Mortgage, Series A 5% Gold bonds, dated January 1, 1915, due January 1, 1965,

50, each \$1000.....\$50,000.00
McGavock & Mt. Vernon Horse Railroad Co. (700 M Issue) 6% bonds dated July 1, 1887, due July 1, 1937, Numbers 249, 251, 303, 529, 574, 575, 630, 638, 654, 657, 663, 668, 671,

13, each \$1000.....\$13,000.00
Nashville Ry. & Light Co. Refunding & Extension Mortgage 5% bonds, dated July 1, 1908, due July 1, 1958,

59 Numbers 4242 to 4300, inclusive

13 Numbers 4450 to 4462, inclusive

15 Numbers 4636 to 4650, inclusive

40 Numbers 4671 to 4710, inclusive

1 Number 4896

128, each \$1,000.....\$128,000.00
Nashville Ry. & Light Co. First Consolidated Mortgage

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5% bonds, dated January 1, 1895, due 1953, Numbers

- 25—563 to 587, inclusive
- 6—2597, 2599, 2680, 2681, 2682, 2714
- 5—2731 to 2735, inclusive
- 2—2884 to 2885, inclusive
- 9—2963 to 2971, inclusive
- 6—2991, 3089, 3090, 3091, 3092, 3093
- 7—3253, 3254, 3255, 3256, 3257, 3350, 3354
- 14—3366 to 3379, inclusive
- 5—3488, 3590, 3591, 3592, 3593
- 7—3640 to 3646, inclusive
- 10—3669 to 3678, inclusive
- 9—3766, 3767, 3839, 3840, 3841, 3842, 3843, 3846, 3847
- 20—3950 to 3969, inclusive
- 2—3983 to 3984, inclusive
- 8—4166 to 4170 and 4172 to 4174, inclusive
- 10—4228 to 4237, inclusive
- 7—4449, 4591, 4604, 4656, 4657, 4658, 4659
- 5—5166 to 5170, inclusive
- 15—5261 to 5275, inclusive
- 25—5286 to 5310, inclusive
- 32—5562 to 5593, inclusive

229, each \$1,000.....\$229,000.00

Cumberland Telephone & Telegraph Co. First and General Mortgage 5% bonds, dated January 1, 1912, due January 1, 1937, Numbers 4709 to 4931, inclusive, and Number 5160

224, each \$1,000.....\$224,000.00

Illinois Central Railroad and Chicago, St. Louis & New Orleans Railroad Joint 5% bonds, dated December 1, 1914, due December 1, 1963

- 3 Numbers 15148 to 15150, inclusive
- 17 Numbers 15464 to 15480, inclusive
- 6 Numbers 16395 to 16400, inclusive
- 6 Numbers 16660 to 16665, inclusive
- 34 Numbers 17601 to 17634, inclusive
- 1 Number 17640
- 50 Numbers 22401 to 22450, inclusive

117, each \$1,000.....\$117,000.00

To Hold, Manage, Preserve and Control the said trust estate; to collect, receive and receipt for all income therefrom and the principal thereof as the same should be paid, and to give full receipt and acquittance therefor; and

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II. To invest and reinvest the principal thereof from time to time available for investment, in such securities and properties as to it (the said company) in the exercise of its discretion and judgment may seem proper; and in such investment and reinvestment the Company is hereby expressly authorized to purchase securities from and owned by the Detroit Company at prevailing market prices, that is at the prices at which such securities from time to time are sold to its customers; and The Company shall not be responsible for loss occasioned by depreciation in the value of any investments so made; but in the sale substitution or other disposition, investment and reinvestment of said trust estate, it is understood and agreed that the approval thereof in writing by Victor E. Shwab and George A. Shwab of Nashville, Tennessee, or the survivor of them, if one shall die, shall, during their lives, or the life of the survivor, first be obtained; and

It is further understood and agreed that during the life of Victor E. Shwab he, the said Victor E. Shwab, shall have, and by Mrs. Dickel is hereby expressly given the right and authority to demand in writing a sale by The Company of any part, or all, of the securities or properties in which said trust estate is now or at any time during his (Victor E. Shwab's) life may be invested, and upon such demand The Company agrees forthwith, or as soon as practicable thereafter, to sell the securities or properties so demanded to be sold—such sale or sales so made, as well as any sales or exchanges at any time made, by The Company hereunder, to be made at current market prices. Any sale made as above under demand of Victor E. Shwab shall be without liability or responsibility on the part of The Company.

It is understood and agreed further that during the life of Victor E. Shwab he shall have, and is hereby expressly given the right and authority, to select the securities and properties for exchange, substitution and reinvestment of any of said trust estate available for reinvestment herein, and his selection thereof shall be without liability whatsoever to The Company. The Company agrees to purchase or exchange any such securities or properties so selected by Victor E. Shwab.

III. The Company is further authorized to take any action by legal proceedings or otherwise which in its discretion and judgment may be expedient and necessary properly to protect and conserve said trust estate

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and the interests confided to it hereunder, and to this end to employ counsel and to incur such expenses and costs and to make such disbursements as the said Company may deem proper. The Company is also authorized to pay all taxes, assessments, governmental charges and expenses upon said trust estate or the income therefrom or against The Company in connection therewith.

IV. It is mutually agreed that the net income (hereinafter defined) shall be remitted and paid as follows—to the said Victor E. Shwab or on his written order in semi-annual installments for and during the term of his natural life, and on the death of Victor E. Shwab the net income to be paid him as herein provided (or to the proper representatives of his estate) shall include not only the net income at the date thereof actually collected and on hand but also the net income on said trust fund accrued to said date but not actually collected.

After the death of Victor E. Shwab this trust shall continue during the lives of the six following named persons (hereinafter referred to as the "Beneficiaries"), and during the life of the last survivor of them. While this trust shall continue as stated, the net income, after the death of Victor E. Shwab shall be paid the said Beneficiaries during their lives respectively, and in equal shares. Said six Beneficiaries who participate in the income are as follows:

Mrs. Louise Lindenberg, wife of Otto H. Lindenberg;

Mrs. Augusta S. Davis, wife of Paul M. Davis;

Mrs. Elizabeth ("Bessie") S. Tate, wife of Benjamin E. Tate;

Felix E. Shwab;

Hugh M. Shwab; and

J. Buist Shwab.

Upon the death of any of said Beneficiaries with issue her or him then surviving, the share of the net income payable to said Beneficiary had he not died, shall be paid to such issue per stirpes. Upon the death of any of said Beneficiaries without issue her or him then surviving, the share of the net income payable to said Beneficiary had he or she not died, shall be divided among and be paid in equal shares to the surviving Beneficiaries and per stirpes to the issue surviving of any deceased Beneficiary.

Upon the death of any of said Beneficiaries and upon the death of the issue of any such deceased Beneficiary, should there be surviving issue of the issue of such deceased Beneficiary, the share of the net income payable

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to the issue of such deceased Beneficiary, should such issue not have died, shall be payable per stirpes, to the surviving issue of the issue of such deceased Beneficiaries.

Upon the death of any Beneficiary without issue her or him surviving, and without issue of such issue then surviving, the representative share of such net income shall be divided among and be paid in equal shares to the surviving Beneficiaries and per stirpes to the surviving issue or the surviving issue of such issue of deceased Beneficiaries.

V. After the death of Victor E. Shwab and of the last survivor of said six Beneficiaries, to pay over, transfer and convey the trust fund (corpus and accrued income) to the children of said Beneficiaries then living per stirpes, and in the event there be grand children of a child (then dead) of any Beneficiary, such grand-child or grand-children shall as a class represent their parent and take as a class the share he or she would have taken if then alive; provided, however, that if the issue (children and grand-children) of any of said six Beneficiaries shall then be extinct, the share or portion of said fund which such issue living would have taken, shall be shared in and an equal portion or share thereof be paid over and transferred to George A. Shwab, son of said Victor E. Shwab, if then living, or to his issue if he be then dead, in the same manner as to said lapsed share or shares, and upon the same terms as if George A. Shwab had been named as one of the Beneficiaries in the first instance.

VI. The Company shall be entitled to full receipts and releases upon said division and payment.

VII. By the term "net income" in this agreement referred to, is meant the gross income collected hereunder less all taxes, assessments, charges, fees and necessary incidental expenses and costs incurred or paid by The Company in respect of said trust estate or income.

It is hereby understood and agreed that premiums on all bonds and securities, and all profits derived from the sale or other disposition of any of the securities or properties held at any time hereunder, shall be treated as principal and not income and added to and become a part of the corpus of said trust estate.

VIII. It is mutually agreed that The Company, without liability to itself, may hold as investments herein, until directed by Victor E. Shwab to sell as is herein provided may be done, any securities in which said trust

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estate is now invested. The Company shall not in any wise be responsible for the application or uses by any payee mentioned herein of any of the net income or principal paid over by The Company pursuant to this agreement.

IX. The Company shall receive for its ordinary services hereunder a sum equal to five per cent. of the gross income collected by it or accrued to date of the termination of this agreement, payable as remittances of income are made, and also reasonable additional compensation for extraordinary services that may be required—any such additional compensation shall during the life of Victor E. Shwab be subject to his approval, and after his death subject to the approval of said George A. Shwab.

X. This agreement shall be subject to termination at any time by Victor E. Shwab and George A. Shwab during the lives of both, or by the survivor of them during his life, by reasonable written notice of such determination addressed to the Detroit Trust Company at Detroit, Michigan. Upon receipt of such notice The Company agrees to take steps forthwith to terminate said trust and deliver over to its successor in trust the said estate and properties as soon as practicable.

The Company also shall have the right at any time during the lives of Victor E. Shwab and George A. Shwab or during the life of the survivor of them, should one die, to terminate the said trust by reasonable written notice to either Victor E. Shwab or George A. Shwab addressed to them at Nashville, Tennessee.

XI. Victor E. Shwab and George A. Shwab, during their lives, and the survivor of them, shall have and is hereby vested by Mrs. Dickel with power and authority upon the termination of this agreement by notice aforesaid, to select and appoint a successor of The Company in its place and stead, such successor to be a Trust Company, or other corporation organized under the laws of any state. Upon any such termination of this agreement and the appointment of a successor to The Company as provided, The Company agrees to account for and pay over and deliver to such successor all the trust estate and properties then in its hands, and upon said transfer the new trustee so appointed shall have authority to receipt to The Company for the securities and properties so transferred to it, and upon proper accounting shall release and discharge the Detroit Trust Company from all responsibility and liability for said estate.

Declaration.

XII. During the life of Victor E. Shwab, The Company agrees to account to him annually, or semi-annually, if requested, showing all receipts and disbursements of The Company of said trust funds. Likewise The Company agrees to account to George A. Shwab during his life should he survive Victor E. Shwab. After the death of both Victor E. Shwab and George A. Shwab, The Company agrees to render accounts to each and every of the Beneficiaries surviving so long as this trust shall continue.

XIII. Mrs. Dickel may at any time add to and increase the said trust fund by future additions, in which event all such securities and property shall become a part of the fund covered by this trust, subject to all the conditions, limitations and covenants herein contained the same as if now included herein.

In Witness Whereof, Mrs. Dickel has hereunto subscribed her name, and The Company has caused its name to be subscribed and its seal to be affixed to this instrument executed in duplicate original, on this the day and date above written.

(Signed) Augusta Dickel.

Detroit Trust Company,

By Ralph Stone,

Vice President;

By Chas. P. Spicer,

Secretary.

State of Tennessee, Davidson County:

On this 22nd day of April, A. D. 1915, before me personally appeared Augusta Dickel (widow), to me known to be the person described in, and who executed the foregoing instrument, and acknowledged that she executed the same as her free act and deed, for the purposes and intents therein expressed.

Witness my hand and seal of office at my office in said county on this the day and date above written.

[Seal.]

R. P. Lawrence,

Notary Public for Davidson County, Tennessee.

State of Michigan, Wayne County, ss.:

On this the third day of June, 1915, before me appeared Ralph Stone and Chas. P. Spicer, to me personally known, who being by me duly severally sworn, did say that they are respectively Vice President and Secretary of the Detroit Trust Company of Detroit, Michigan, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that they signed and sealed said instrument on behalf of said cor-

Déclaration.

poration, with authority so to do, and by authority of its board of directors, and said Ralph Stone and Chas. P. Spicer acknowledge said instrument to be the free act and deed of said corporation.

Witness my hand and seal of office at my office in said county on this the day and date above written.

[Seal.]

Louis S. Dudley,

Notary Public for Wayne County, Michigan.

My commission expires March 22nd, 1919.

It is understood that the schedule of securities in the within agreement is hereby amended to cover the following changes in the bonds assigned to and deposited with the Detroit Trust Company thereunder, viz.:

Instead of Two Hundred twenty-four thousand and no/100 (\$224,000.00) Dollars par value of Cumberland Telephone & Telegraph Company first and general mortgage 5% bonds, as described in the agreement, there has been assigned and delivered to Detroit Trust Company, to be included in said agreement only One Hundred seventy-four Thousand and no/100 (\$174,000.00) Dollars par value of said bonds, being a difference of Fifty Thousand and no/100 (\$50,000.00) par value.

In lieu of said Fifty Thousand and no/100 (\$50,000.00) Dollars of bonds, there have been assigned to and received by Detroit Trust Company to be held under the terms of said agreement, Fifty Thousand and no/100 (\$50,000.00) Dollars par value 5% Commonwealth-Edison Company bonds, dated the 1st day of September, 1908, maturing the first day of June, 1943, bearing September 1st, 1915, and subsequent coupons. Numbers 25713, 33202/17, 33221/3, 33225/35, 34361/73, 34571/2, 34956, 35079/80, 35171. Par value \$1,000.00 each. Total par value \$50,000.00

Augusta Dickel. (L. S.)

Detroit Trust Company,

[Seal.]

By Ralph Stone,

Vice-President;

By Chas. P. Spicer,

Secretary.

Exhibit "B."

December 14, 1917.

Emanuel J. Doyle, Esq.,

U. S. Collector of Internal Revenue,

Fourth Collection District of Michigan,

Grand Rapids, Mich.

Dear Sir:

As Executor of the last will and testament of Augusta

Declaration.

Dickel, late of Charlevoix, Michigan, now deceased, I am in receipt of notice from you under date of December 7, 1917, that there has been assessed against the Augusta Dickel estate the sum of \$59,136.05 for additional estate tax, accompanied by your demand for the payment of said tax. I understand that from this sum it is your intention to deduct \$2587.64 heretofore paid by me, thus leaving a balance of \$56,546.41 payment of which is demanded by you under threat of the imposition of the penalties and interest mentioned in your notice.

In behalf of the estate of Augusta Dickel, deceased, I therefore hand you herewith check for \$56,546.41 so demanded by you.

I make this payment to you under protest. It is my claim that the above mentioned additional estate tax in the sum of \$56,546.41 is not properly and legally assessable; that neither the estate of said Augusta Dickel, deceased, nor myself, as executor thereof, owes to the United States the above mentioned sum of \$56,546.41, nor any other sum whatsoever; that, in behalf of the estate of said Augusta Dickel, deceased, I have already paid all estate taxes which are properly assessable against said estate; and in behalf of the estate of said Augusta Dickel, deceased, I, as executor of the last will and testament of said deceased, therefore ask and demand that the moneys herewith paid to you be refunded.

The grounds upon which I, as executor as aforesaid, protest against the payment of said tax are the following:

First—The additional estate tax imposed upon the estate of August Dickel, deceased, is not imposed upon the transfer of the net estate of said Augusta Dickel, who died on September 16, 1916, but the same is sought to be imposed upon a transfer of property made by Augusta Dickel to the Detroit Trust Company, Trustee, by instrument bearing date April 21, 1915, executed and acknowledged by said Augusta Dickel on April 22, 1915.

Second—The additional estate tax imposed upon the estate of Augusta Dickel is sought to be imposed upon said transfer of property made by Augusta Dickel to the Detroit Trust Company, Trustee, bearing date April 21, 1915, and said transfer was not made by said Augusta Dickel in contemplation of death.

Third—Said additional estate tax is sought to be imposed under the supposed authority of title II of an Act of the Congress of the United States, entitled "An Act to Increase the Revenue, and for Other Purposes," ap-

Declaration.

proved September 8, 1916, and said Act is not retrospective in character and does not authorize the imposition of an estate tax upon the transfer of property made in or about April of the year 1915, long prior to the passage of said Act of Congress.

Fourth—The transfer of property made by said Augusta Dickel to the Detroit Trust Company, Trustee, by instrument bearing date April 21, 1915, was made at a time when the above mentioned Act of Congress had not been proposed and was not contemplated and the transfer then made was not such a transfer as is embraced within the true intent and meaning of said Act of Congress, and was not in contemplation of death within the meaning of title II of said Act.

Fifth—Even if the Act of September 8, 1916, be retroactive in character, and the transfer made to the Detroit Trust Company April 21st, 1915, be within its terms, in so far as it affects that transfer it is ineffectual and void for that it is a denial of due process of law, and the taking of private property without compensation.

I, Victor E. Shwab, as Executor of the last will and testament of said Augusta Dickel, deceased, do, therefore, notify you that the above mentioned additional estate tax in the sum of \$56,546.41 is paid under protest; that it is illegally exacted by you; that I contend that said additional estate tax is illegal and void; that I pay the same only because required by you to do so under threat of the imposition of penalties and interest; and that I intend to institute suit against you to compel the repayment of said tax.

This protest, now filed by me, will shortly be followed by a claim sworn to by me, for the refund of the above mentioned additional estate tax which I am now improperly forced to pay.

Yours, etc.,

V. E. Shwab,

Executor of the Last Will and Testament of Augusta Dickel, Deceased.

Exhibit "C."

State of Tennessee, County of Davidson, ss.:

Victor E. Shwab, of the City of Nashville and State and County aforesaid, being duly sworn according to law, deposes and says that he is the Executor of the last will and testament of Augusta Dickel, late of Charlevoix, Michigan, now deceased; that he makes this claim in behalf of the estate of Augusta Dickel, deceased, and is properly authorized so to do; that upon the seventh

Declaration.

day of December, 1917, the estate of said Augusta Dickel, deceased, was assessed an internal revenue tax of \$59,136.05, upon which there was allowed credit for a payment theretofore made in the sum of \$2587.64, leaving the net amount of said internal revenue tax against said estate \$56,546.41, the same being an additional estate tax (so-called) imposed upon said estate; which amount this deponent, as Executor of the last will and testament of Augusta Dickel, deceased, afterwards and on the 15th day of December, A. D. 1917, acting in behalf of said estate, paid to Emanuel J. Doyle, Esq., Collector of Internal Revenue for the Fourth District of Michigan, and which amount, as this deponent verily believes, should be refunded, for the following reasons:

First—The additional estate tax imposed upon the estate of Augusta Dickel, deceased, is not imposed upon the transfer of the net estate of said Augusta Dickel, who died on September 16, 1916, but the same is sought to be imposed upon a transfer of property made by Augusta Dickel to the Detroit Trust Company, Trustee, by instrument bearing date April 21, 1915, executed and acknowledged by said Augusta Dickel on April 22, 1915.

Second—The additional estate tax imposed upon the estate of Augusta Dickel is sought to be imposed upon said transfer of property made by Augusta Dickel to the Detroit Trust Company, Trustee, bearing date April 21, 1915, and said transfer was not made by said Augusta Dickel in contemplation of death.

Third: Said additional estate tax is sought to be imposed under the supposed authority of title II of an Act of the Congress of the United States, entitled "An Act to Increase the Revenue, and for Other Purposes," approved September 8, 1916, and said Act is not retrospective in character and does not authorize the imposition of an estate tax upon said transfer of property made in or about April of the year 1915, long prior to the passage of said Act of Congress.

Fourth—The transfer of property made by said Augusta Dickel to the Detroit Trust Company, Trustee, by instrument bearing date April 21, 1915, was made at a time when the above mentioned Act of Congress had not been proposed and was not contemplated and the transfer then made was not such a transfer as is embraced within the true intent and meaning of said Act of Congress, and was not in contemplation of death within the meaning of title II of said Act.

Fifth—Even if the Act of September 8th, 1916, be re-

Plea.

troactive in character, and the transfer made to the Detroit Trust Company April 21st, 1915, be within its terms, in so far as it affects that transfer it is ineffectual and void for that it is a denial of due process of law, and the taking of private property without compensation.

And this deponent, as Executor of the last will and testament of Augusta Dickel, acting in behalf of said estate, now claims that, by reason of the payment of said sum of \$56,546.41 he is justly entitled to have the said sum of \$56,546.41 refunded and he now asks and demands the same.

And this deponent further makes oath, that neither the said claimant, Victor E. Shwab, as Executor of the last will and testament of Augusta Dickel, deceased, nor said Augusta Dickel Estate, is indebted to the United States in any amount whatever, and that no claim has heretofore been presented for the refunding of the above amount, nor any part thereof.

(Signed) V. E. Shwab.

Subscribed and sworn to before me this 19th day of December, A. D. 1917.

[Seal.]

Paul M. Davis,

Notary Public in and for Davidson County, Tennessee.

My commission expires April 21, 1919.

PLEA—Filed October 9, 1918.

And now comes said defendant by Myron H. Walker, United States Attorney for the Western District of Michigan, acting in his behalf, and demands a trial of the matters and things set forth in the plaintiff's declaration filed herein.

Dated October 9, 1918.

Myron H. Walker,
United States Attorney.

Address: Room 334, Federal Bldg., Grand Rapids, Mich.

To Messrs. Butterfield and Keeney, Attorneys for Plaintiff.

VERDICT FOR DEFENDANT—Entered June 13, 1919,
by Clarence W. Sessions, District Judge.

The jury heretofore empaneled in this cause, sat together in the jury seats and heard the arguments of counsel and the charge of the court, and thereupon retired from the bar of the court in charge of Wiley O'Connor, an officer of the court, duly sworn to attend them to consider of their verdict to be given; and after having been absent for a time return into court and say upon their oath that the said defendant did not undertake and promise, in manner and form, as the said plaintiff hath in his declaration in this cause complained against him.

JUDGMENT FOR DEFENDANT—Entered July 1,
1919, by Clarence W. Sessions, District Judge.

The jury by whom the issue joined in this cause was tried having rendered a verdict in favor of the defendant and against the said plaintiff, therefore, it is considered that the said plaintiff take nothing by his suit in this behalf and that the said defendant do go thereof without day.

And it is further considered that the said defendant do recover against the said plaintiff his costs by him about his defense in this suit expended to be taxed and that the said defendant have execution thereof.

MOTION FOR NEW TRIAL—Filed July 1, 1919.

Please take notice that the annexed motion for new trial will be brought on for hearing on the 8th day of July, 1919, at ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard.

Dated June 30, 1919.

Butterfield, Keeney & Amberg,
Attorneys for Plaintiff.

To Myron H. Walker, United States Attorney, Attorney for Defendant.

Now comes the plaintiff, by Butterfield, Keeney & Amberg, his attorneys, and moves the court to set aside the verdict of the jury in this cause, and to grant a new trial thereof, for the following reasons:

1. Because the verdict of the jury is against the clear and overwhelming weight of the evidence.

2. Because upon the undisputed facts in this case, the jury should have been directed to find a verdict for the plaintiff.

3. Because the court erroneously left it to the jury to determine as a matter of fact whether the deed of trust of date April 21, 1915, executed by Mrs. Dickel to the Detroit Trust Company was made in contemplation of death, when there was no evidence in the case to support a verdict that said deed of trust was made in contemplation of death.

4. Because if there were any evidence to go to the jury on which to base a verdict in favor of defendant, it was a scintilla merely, and should have been disregarded, and a verdict in favor of plaintiff should have been found.

5. Because the court erred in refusing to give to the jury plaintiff's requests to charge, numbered one to twelve, both inclusive.

6. Because the court erred in ruling that the Act of Congress of September 8, 1916, is retrospective in character, and that it does impose a tax upon said deed of trust of date April 21, 1915, or what amounts in substance to the same thing, that it does impose a tax upon the transfer of the estate owned by Mrs. Dickel at the date of her death, on September 16, 1916, which tax, however, is measured, not merely by the value of the estate so transferred, but, in addition, by the value of the property transferred by said deed of trust, which property had, prior to the passage of said act, become vested absolutely in third parties.

7. Because the court erred in ruling that said Act of September 8, 1916, if construed so as to sustain the tax

Motion for New Trial.

of \$56,546.41 paid by plaintiff under protest on December 15, 1917, was not unconstitutional or void as a denial of due process of law, and the taking of private property for a public use without compensation contrary to the Fifth Amendment to the Constitution of the United States.

8. Because the court erred in permitting the plaintiff to be cross-examined concerning confidential income tax returns filed by plaintiff for himself or as agent for Mrs. Dickel.

9. Because the court erred in charging the jury, among other things, substantially, that the meaning of the term "in contemplation of death" is not limited to an expectancy of immediate death, or a dying condition, and that it is not necessary, in order to constitute a transfer in contemplation of death, that the transfer be made while death is imminent, while it is immediately impending by reason of bodily condition, ill health, disease or injury, or something of that kind, but that a transfer may be said to be made in contemplation of death if the expectation and anticipation of death, in either the immediate or reasonably distant future, is the moving cause of the transfer, and that if the jury find that Mrs. Dickel in April, 1915, was moved to create the trust, and to make the transfer to the Detroit Trust Company, by her expectation or anticipation of death in either the immediate or reasonably distant future, then the jury will be warranted in finding that this transfer was made in contemplation of death.

10. Because the court erred in charging the jury, among other things, substantially, that the jury have the right to take into consideration the provisions of the statute creating the presumption that transfers in the nature of a final disposition or distribution made within two years prior to death shall, unless shown to the contrary, be deemed to have been made in contemplation of death, and that the burden in this case is upon the plaintiff to establish, by a fair preponderance of the evidence, taking into consideration the presumption which the statute creates, that this transfer was not made by Mrs. Dickel in contemplation of death, and that the jury should say from the evidence in the case, bearing in mind the presumption which the statute raises, and giving it the consideration to which it is entitled, and it is to be considered by the jury in connection with the other evidence in the case, whether or not that trans-

Order.

fer by Mrs. Dickel to the Detroit Trust Company at that time was made by her in contemplation of death.

11. Because the court erred in charging the jury, among other things, substantially, that the jury should take into consideration any other instruments, like wills, that were executed about the same time as said deed of trust.

12. Because the court committed other errors in the charge given to the jury, and in ruling upon evidence.

This motion is based upon the records and files in this cause, upon the testimony given and the charge given to the jury, and other proceedings had at the trial thereof.

Dated June 30, 1919.

Butterfield, Keeney & Amberg,
Attorneys for Plaintiff.

**ORDER EXTENDING TIME TO SETTLE BILL OF
EXCEPTIONS**—Entered July 1, 1919, by Clarence
W. Sessions, District Judge.

Upon the reading and filing of the annexed stipulation of even date herewith, and upon due consideration thereof,

It is ordered that the plaintiff in the above entitled cause shall have sixty days from the date hereof in which to prepare, and have settled a bill of exceptions.

BOND TO STAY PROCEEDINGS—Filed July 1, 1919.

Know All Men By These Presents, that we, Victor E. Shwab, Executor of the last will and testament of Augusta Dickel, deceased, as principal, and Willard F. Keeney and Julius H. Amberg, as sureties, are held and firmly bound unto Emanuel J. Doyle, United States Collector of Internal Revenue for the Fourth Collection District of Michigan, in the full and just sum of one thousand (\$1000) dollars, to be paid to the said Emanuel J. Doyle, United States Collector of Internal Revenue for the Fourth Collection District of Michigan, his certain attorneys, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this first day of July, in the year one thousand nine hundred and nineteen.

Whereas, lately, at a term of the District Court of the United States for the Western District of Michigan, Southern Division, in a suit pending in said court between Victor E. Shwab, Executor of the last will and testament of Augusta Dickel, deceased, as plaintiff, and Emanuel J. Doyle, United States Collector of Internal Revenue for the Fourth Collection District of Michigan, as defendant, a judgment was rendered against the said plaintiff, and for the defendant, no cause of action and costs; and the said Victor E. Shwab, Executor of the last will and testament of Augusta Dickel, deceased, having obtained a writ of error from the Circuit Court of Appeals of the United States, for the Sixth Circuit, to reverse the judgment in the aforesaid suit.

Now, therefore, the condition of the above obligation is such that if the said Victor E. Shwab, Executor of the last will and testament of Augusta Dickel, Deceased, shall prosecute his said writ of error to effect, and will answer all damages and costs if he fail to make his plea good, then this obligation to be void; else to remain in full force and virtue.

Victor E. Shwab, (L. S.)

By Willard F. Keeney,

His Atty, in Fact.

Willard F. Keeney, (L. S.)

Julius H. Amberg. (L. S.)

United States of America, Western District of Michigan,
County of Kent, ss.:

Willard F. Keeney and Julius H. Amberg, being severally sworn, do depose and say, each for himself, that

Order.

he is worth a sum in excess of one thousand (\$1000) dollars.

Willard F. Keeney,
Julius H. Amberg.

Subscribed and sworn to before me this 1st day of July, A. D. 1919.

Georgia Freberg,
Notary Public, Kent County, Michigan.

My commission expires July 7, 1919.

Approved: C. W. Sessions,
District Judge.

ORDER DENYING MOTION FOR NEW TRIAL—Entered July 31, 1919, by Clarence W. Sessions, District Judge.

The motion of said plaintiff for a new trial in this cause came duly on this day to be heard and was argued by counsel for the respective parties, and thereupon, it is ordered by the court that said motion be and it hereby is denied; and by leave of the court first obtained the plaintiff duly excepted to said order and ruling.

ORDER EXTENDING TIME TO SETTLE BILL OF EXCEPTIONS—Entered August 25, 1919, by Clarence W. Sessions, District Judge.

On application of counsel for the plaintiff, it is ordered that the time for settling a bill of exceptions in this case be and it hereby is extended for the period of ten (10) days after the expiration of the time now limited therefor.

ORDER EXTENDING TIME TO SETTLE BILL OF EXCEPTIONS—Entered September 3, 1919, by Clarence W. Sessions, District Judge.

Upon reading and filing of the annexed stipulation even date herewith, and upon due consideration thereof,

It is ordered that the plaintiff in the above entitled cause shall have until the 10th day of October, 1919, within which to prepare and have settled a bill of exceptions.

BILL OF EXCEPTIONS—Filed October 8, 1919.

At a session of said court, held at the District Court Rooms, in the City of Grand Rapids, in said District and Division of Michigan, on the tenth day of June, 1919, before the Hon. Clarence W. Sessions, District Judge, the issue joined between the parties to this cause came on to be tried before a jury for that purpose duly impaneled and sworn, and the trial was continued thereafter from day to day until the 13th day of June, 1919.

At the trial thereof there came the plaintiff, by his attorneys, Willard F. Keeney and Julius H. Amberg, of the firm of Butterfield, Keeney & Amberg, and the defendant, by his attorneys, Myron H. Walker, United States Attorney, and B. M. Kelleher, United States Solicitor of Internal Revenue.

Thereupon the following proceedings were had:

Mr. Keeney made an opening statement in behalf of plaintiff.

Charles P. Spicer,

being duly sworn as a witness in behalf of plaintiff, testified as follows:

Direct Examination.

By Mr. Keeney:

I live in Detroit, Michigan. I am Vice-President of Detroit Trust Company. That Company has been engaged in business at Detroit since 1900. I have been connected with it since 1902. I entered the employ of

Charles P. Spicer.

Detroit Trust Company as a clerk. My first official position was Assistant Secretary, then Secretary, then Secretary and Vice-President and now Vice-President alone. I think I have been a Vice-President of the Company since January, 1914. I am connected with the Trust Department of the Trust Company. The various departments of our company are the Financial Department, as we call it, the Trust Department, the Public Accounting Department, the Bond Department and the Institutional Department. I have been connected with the Trust Department ever since I entered the service. More particularly the nature of the business of our Trust Department is the handling of all kinds of estates, trust matters, trust agreements, escrow deposits, receiverships, trusteeships, and various sundry matters of that character. The Trust Department has charge of the matters wherein Detroit Trust Company acts as executor or administrator under wills or as trustee under wills or as guardian of minor or incompetent persons. That department also has charge of the trusts that are created, not by law, like an executor or administrator, but by private agreement. We have handled a great many trusts of that sort by private agreement of the parties.

I recollect some negotiations with Mr. Shwab relative to the trust to be placed in our hands by Augusta Dickel. I have correspondence to show when that was first called to the attention of the Detroit Trust Company. The first letter is a letter dated March 10, 1914, signed by V. E. Shwab and addressed to Mr. Howard J. Leshner, as Treasurer of Detroit Trust Company. Mr. Leshner had previously been the Treasurer of the Company, but at the time that letter was received, he had resigned and was no longer connected with us. He had shortly before been the treasurer. The bank directories no doubt showed his name as Treasurer, although he had resigned.

The letter of date March 10, 1914, from V. E. Shwab to Howard J. Leshner, Treasurer of the Detroit Trust Company, Detroit, Michigan, was introduced in evidence and marked Exhibit A, and was read by Mr. Keeney.

That letter was referred to me for attention. It was answered by me.

(The witness was shown a paper.)

That is a letter of date March 13, 1914, written by me to Mr. Schwab. It is addressed to Mr. Shnoe, you will see. I mistook his signature on the original letter and replied to Mr. Shnoe. I did not know his name was

Charles P. Spicer.

Shwab. I thought it was Shnoe and I so replied, but I addressed the letter care of George A. Dickel & Co., so that it reached the right person.

The above mentioned letter was introduced in evidence and marked Exhibit "B" and read by Mr. Keeney.

After the letter of March 13, 1914, written by me to Mr. Schwab, I had no further word from Mr. Schwab, after I replied to his first letter, until April 17, 1915, when I received a letter from him, dated April 15, 1915. I have that letter. I think that was just a year and a month subsequent to the time of my former letter.

The letter of date April 15, 1915, written by V. E. Schwab to the Detroit Trust Company was introduced in evidence and marked Exhibit "C" and read by Mr. Keeney.

I replied to that letter. The letter which I hold in my hand, attached to the depositions taken at Nashville, is the original of the reply so written by me to Mr. Schwab.

The letter of date April 17, 1915, written by Detroit Trust Company, by C. P. Spicer, Vice President, to V. E. Schwab, was introduced in evidence and marked Exhibit "D" and read by Mr. Keeney.

After reading that letter, I went to Nashville. I arrived there on or about April 20th, I presume. I don't remember the exact date. I think I could verify that by my expense voucher. I evidently left Detroit on April 19th as contemplated, and that would have brought me to Nashville on the 20th. At Nashville I saw Mr. Victor E. Schwab and Mr. John J. Vertrees, his attorney. I had a conference with them relative to this trust. I met Mr. Schwab and Mr. Vertrees at Mr. Vertrees' office on Church street, I think it is, Nashville, and had with me a draft of the agreement that Mr. Vertrees had prepared and sent to us, and he and I discussed the terms and conditions of it very fully. When I say "he and I," I mean the three—all three of us, but Mr. Vertrees and I discussed the legal provisions as applying to this agreement and modified certain provisions of the draft and rewrote others and put in some new ones to meet our views of what the agreement, from our standpoint, should contain. That redraft of the agreement was typewritten there at Nashville. It was finally put in form approved both by Mr. Vertrees and myself. Mr. Schwab knew absolutely what was in the agreement also.

I think it was upon the 20th that I arrived there at Nashville. I evidently returned to Detroit on April 24th. From that, I should judge I left Nashville prob-

Charles P. Spicer.

ably on the 23rd, perhaps the 22nd, in the evening; I don't remember.

When I was at Nashville, I had an interview with Mrs. Dickel herself. After Mr. Vertrees and Mr. Shwab and I had discussed the agreement and after I became familiar with the intentions and purposes, and the plans and the draft had been tentatively agreed to by ourselves, I insisted to Mr. Shwab that I would not undertake any such agreement on behalf of our company, particularly involving irrevocable features of that kind, and also particularly in view of a trust of that size, without having a personal interview with the creator of the trust, to satisfy myself in my own mind as to her mental competency, at least, in making any such arrangement. It is a policy that we have always had in the office and one that I had no reason to forego on this occasion.

Mr. Shwab said, "Certainly. I would be very glad to have you meet Mrs. Dickel and I will arrange to have you go to the house." So Mr. Davis, Mr. Shwab's son-in-law, drove me out in his car to Mr. Shwab's house and introduced Mrs. Dickel to me, and withdrew, and she and I had a half or three-quarters of an hour conversation there on the subject of this agreement and on various matters, in order for me—I made this arrangement to determine, as I say, exactly her mental condition, before I would undertake to accept the trust. I was very agreeably surprised with Mrs. Dickel. She was a dignified, aristocratic appearing old lady, gracious and pleasant. I had a very enjoyable conversation with her and was perfectly satisfied, absolutely satisfied in my own mind, that she knew absolutely what she was doing and the purport and effect of the agreement.

I discussed with Mrs. Dickel at that time some of the features of this agreement. I was more interested from our viewpoint, in satisfying myself as to her ability to make the agreement, and my questions and conversation with her, while I did not tell her, of course, that I was asking for that purpose, were to determine those points, and I particularly emphasized the fact that this was—

Mr. Walker: I object to that method of telling the conversation.

The Court: Just tell us what you said, as nearly as you can.

I asked her if she realized the effect of an irrevocable arrangement of this kind and she said she did. I asked her, in effect, if she understood that meant that once

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done, it could not be undone by her, and she said she did. I could not answer definitely whether anything was said at that time relative to her relations to Mr. and Mrs. Shwab or their children. Our conversation was quite general on various matters. I don't remember that she spoke particularly about her relations to the Shwab family to me. So far as I could determine her health was good. She came into the room unassisted, sat down unassisted, got up unassisted and appeared to be in good health.

"Q. Was there anything that occurred there, so far as you could judge from Mrs. Dickel's appearance or actions, that led you to think that her death was in any wise impending at that time?

Mr. Walker: I think that is incompetent. State what he saw and observed. I think that is going as far as competency will allow him to go. I object to it as incompetent.

The Court: I think I will sustain that objection. This man doesn't pretend to be a medical expert.

Mr. Keeney: Note an exception."

After seeing Mrs. Dickel in this interview of which I have spoken, I saw Mr. Shwab and Mr. Vertrees again. This trust agreement was executed at or about that time. Pardon me, if you mean by us, it was not executed by us in Nashville. It was executed by Mrs. Dickel at or about that time. What I mean is that the acceptance of the trust by our company was not signed, or we did not sign the agreement in evidence of our acceptance of the trust at Nashville. Our by-laws require two signatures in matter of that kind, so I was not able to complete the execution, even though I had signed it as an officer. The execution of the agreement on behalf of our company was completed later. So far as our company is concerned, that was done at Detroit, but so far as Mrs. Dickel was concerned it was done at Nashville.

I have the original of that trust agreement in my possession.

The trust agreement of date April 21, 1915, executed by Mrs. Augusta Dickel and the Detroit Trust Company, was introduced in evidence and marked Exhibit E, and read by Mr. Keeney. Included in this exhibit was an attached memorandum.

I recall the making of some substitution of securities respecting which there was a memorandum between the parties. The facts are that Mr. Shwab changed his

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mind after I left Nashville about some of the bonds that were to be deposited, and sent on some in place of some that had been originally intended to go in, so I dictated, when they were received, a memorandum of substitution, showing a change in the deposit of the securities as made with us. That memorandum that was signed by the parties in that regard is attached to and is a part of the trust deed.

I did not take home with me in my grip, at the time, the million dollars face value of bonds which the deed of trust just read described. Mr. Shwab asked me to take them along with me, but I did not like to do it; I didn't like to take the responsibility of carrying them up with me; particularly in view of the fact that we had not signed the agreement I did not want to acknowledge their receipt officially in Nashville and be charged with them in Nashville then have the responsibility of carrying them home to Detroit. I preferred that they should be shipped by him to Detroit, checked over and counted by us and verified there, and then the agreement signed and sent back to him. That was the course followed.

The trust agreement that has just been read shows that it was acknowledged by Augusta Dickel at Nashville upon April 22nd. That would be while I was still at Nashville. I was in Nashville, then, upon that date. The signature of the Detroit Trust Company was not affixed to the agreement by me while I was at Nashville, for the reasons that I have already stated—that there were not two officers of our company at Nashville.

I don't remember just how this instrument that I have now got came to Detroit; whether I took it back with me to Detroit or whether it was sent to us by mail after I left Nashville. I believe I took it back with me. My best recollection at this time is that I took back with me this instrument to Detroit, but that in the form in which I took it back to Detroit it had been signed and acknowledged by Mrs. Dickel but had not yet been signed and acknowledged by the Detroit Trust Company.

This memorandum that I say was subsequently made, relative to the substitution of securities, is the memorandum that appears upon the last page of this document, with the signatures "Augusta Dickel" and "Detroit Trust Company" attached. The words "Sign and return this to Detroit Trust Company," in pencil, at the top of that memorandum, is in my handwriting. My best recollection as to when that notation was attached

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to this memorandum is that that was made at the time of the receipt of the securities from Nashville. In other words, they sent us, from Nashville, a million dollars in securities, but they were not precisely the same securities that were described in the document itself.

The memorandum attached to Exhibit "E" was, by consent, considered a part of Exhibit "E" and was read by Mr. Keeney.

When I was at Nashville, Mr. Shwab and myself had a conversation with respect to the reasons for placing this trust in the hands of the Detroit Trust Company. After the agreement was concluded verbally, tentatively, I jokingly asked Mr. Shwab why he picked out the Detroit Trust Company from among all the other trust companies, to act as trustee in this matter. He said, "You need not think that I have lit on your company blindly," or words to that effect. He said, "I have been writing around the country to get the laws of the various states, and then when I selected Michigan as being probably as advantageous as any, I investigated the various trust companies in Michigan, to make a selection from among them," and he said, "I have met a good many people (naming one whom I remember now) who had known your company and your officers and individuals, and I have never heard anything in the nature of any adverse criticism at all; everything was favorable, and I made up my mind I would be perfectly satisfied to have your company act as trustee in the matter."

I cannot state the date when the \$1,000,000 of bonds came up by express or otherwise from Nashville, any more accurately now, without referring to our records in the office, than to say that they were received between April 22nd or 23rd and June 3, 1915, June 3d being the date of the acknowledgment upon the instrument, made at Detroit, when Mr. Stone and myself, as officials, acknowledged the execution of the trust. Our records, no doubt, will show the exact date upon which those bonds were at least entered on our records. That may have been the date they were actually received through the mail, or it may have been a day or two later, but approximately the exact date, I haven't that exact memorandum of our exact date with me now, but I know it must have been some time between April 23rd and June 3rd of the year 1915.

After these securities described in this instrument were received by our company, the company proceeded to collect the interest upon the bonds represented by the

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coupons. The ordinary course of procedure was followed in this case as in any other similar cases. The bonds were inventoried on what we call a "journal entry" and they were entered on our records from that journal entry and entered on the auxiliary records placed in the files under its appropriate number, the number of this trust, and the coupons were presented for collection when they were due, and entered on our records, and everything followed out absolutely in the ordinary course of business.

The net income that we have collected for interest upon these bonds has been remitted to Victor E. Shwab ever since the opening of the trust. I have the original receipted vouchers for all remittances made, from the first one, which was dated October 6, 1915, to and including the last one, of date April 21, 1919. Our course of business has been to remit the interest moneys to Mr. Shwab, as a life beneficiary, and we transmit with that a voucher, which is signed by him as evidence of the fact that he received this money. A voucher form accompanies our check or draft. These vouchers which I hand you are vouchers showing the payment of interest in that way by our company to Mr. Shwab, from October 6, 1915, to April 21, 1919, inclusive.

Fourteen vouchers, covering dates from October 6, 1915, to April 21, 1919, both inclusive, were offered in evidence.

Mr. Walker: I object to them, beyond the date of the semi-annual payment, after the death of Mrs. Dickel. I don't know when that semi-annual payment would be.

A. There wasn't any regular semi-annual date.

Mr. Walker: I object to any and all of them except so far as they refer to the income or the payments made during the lifetime of Mrs. Dickel or income that accrued during her lifetime, the disposition of that income; what transpired after that is wholly immaterial for the purposes of this suit, I take it.

The Court: I think it might be important upon a certain phase, as to whether there was any difference in the dealings of the parties, the treatment of the trust, after the death of Mrs. Dickel.

Mr. Keeney: If it is conceded by counsel that there was no difference in the treatment—

Mr. Walker: I am not prepared to concede it; I ask an exception.

The Court: They will be received.

The fourteen vouchers were marked Exhibit "F," and

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their numbers, date and amount were read by Mr. Keeney.

The Court: If those are all alike, just let me see them.

Mr. Keeney: They are all alike except the first, Your Honor. I will call the attention of the witness to that; the first voucher shows a draft attached, drawn by Mr. V. E. Shwab on the Detroit Trust Company for \$17,000 payable to the order of the Fourth and First National Bank of Nashville. The other vouchers show no draft attached. Will you kindly explain to us briefly the reason for that difference?

A. The voucher you referred to was the first voucher remitted to Mr. Shwab, and he did not understand, apparently, our method of remittances in trust of this kind; he thought evidently that he had to draw on us for the income in order to get it; so he drew a draft on us for \$17,000, which we honored and paid, and told him that hereafter he need not do that any more; that we would remit direct to him without his drawing on us, which we have continued to do ever since.

The entire net income that we have collected from this trust fund has been paid in that way to Victor E. Shwab up to April, 1919. Whether there are any accumulations now on hand and not remitted, I don't know. We have paid none of the net income whatsoever to any other person. Augusta Dickel, to my knowledge, has had nothing whatsoever to do with this trust at any time since the execution of this trust agreement of April 21, 1915. At the time of the execution of this trust deed at Nashville, in April of 1915, I was informed as to whether Augusta Dickel was the owner of other property besides that which was embraced in this trust deed. Mr. Shwab told me, in effect—I don't remember the exact words—that this was not all of Mrs. Dickel's property by any means; that she had other property besides.

Cross-Examination.

By Mr. Walker:

I haven't with me, among my papers, the draft of the proposed trust agreement that was sent to us by Mr. Shwab in April, 1915, before I went down there. Neither have I it in the office. That was taken back by me to Nashville and worked over between Mr. Vertrees and myself, as I have stated, and I left it there. I have no memorandum of it. I went over it very carefully. When I went to Nashville, I went to the office of Mr. Vertrees

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in Nashville, Mr. Shwab's attorney, and there met Mr. Vertrees and Mr. Shwab. We were, I presume, practically all of the first day, or most of the first day, at a conference between us three over this trust affair and trust agreement and the form it should take, and I remember very distinctly taking the work home with me at the hotel and working practically all night on it myself.

I do not know whether it was the first, second or third day that I was there that I went out and saw Mrs. Dickel. I went out to see her after we had completed the agreement, after we had re-drafted it and had it in re-drafted form; after we had it in its present form, in fact; it was not changed after that, to my knowledge. Mrs. Dickel did not make or suggest any changes in it. I did not go out there the first day to see Mrs. Dickel. After I worked over it all night and went back again to Mr. Vertrees' office the second time, I there again met Mr. Shwab, with Mr. Vertrees, the second day. He was there practically all the time. I remember taking a long automobile drive with Mr. Davis. He took me all over; out to the Country Club and all over the town, and showed me the sights, and we landed up at Mr. Shwab's house. I judge from that that I was not at the office very much of that day. Mr. Davis was Mr. Shwab's son-in-law. When I say I "landed at Mr. Shwab's house," that was the time and the only time that I saw Mrs. Dickel. I saw her that time on that visit. I think that is the only time I had ever been to his house.

I worked over this draft the first day with Mr. Vertrees and Mr. Shwab, discussed it and talked it over and went over it, consulted about it. That night I took it to my hotel and myself worked over it a good share of the night. I should say that the next day I went back to Mr. Vertrees' office and there again met Mr. Shwab, and as a result of that, a new draft, involving the changes was made, which is the draft that was finally executed, and it was after that new draft was made and completed that I went and saw Mrs. Dickel for the first time. I did not see her before I concluded the agreement. I did not consult Mrs. Dickel upon the terms of this trust in any way whatever, except such consultation as I had in that first and final interview with her on that visit.

Q. And yet it was disposing of a million dollars of Mrs. Dickel's property?

A. Yes.

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I can now very distinctly recall some of the amendments or changes, small or great, that were made in the final draft as it now is from the draft as it was sent to me in Detroit. Some of those changes were some of the matters that appear here, especially with reference to the Detroit Trust Company and its liability and authority in the matter, and some of the practical operating provisions. Those, of course, as to the fair protection of the Trust Company I would be expected to look after, and did look after. There were no changes made in the general effect or purposes of the trust at all.

While I was there I don't remember any such thing as learning from Mr. Vertrees or Mr. Shwab that Mr. Vertrees had made a previous draft of a proposed trust agreement before the one that was sent to us at Detroit, the year before or some length of time before that one was sent to us at Detroit. I don't remember hearing of it. I don't think I ever heard of it. So if I never heard of it and if there was a substantial change made in the trust features, the main features of the trust, between the draft made in 1914 and this one in 1915, I would not know anything about that. They did not inform me anything about it. I never heard whether in some tentative draft or some previous draft of a proposed trust agreement a different disposition had been made of the income of this trust fund during the life of Mrs. Dickel from what was made in this agreement as executed. I never heard of it and I don't know anything about it.

Q. So you couldn't give us any light upon that: then I will not pursue it. You stated upon direct examination, I think, in substance this, and is this correct; that I insisted, I think you used that word, that I insisted to Mr. Shwab that before consummating this arrangement I should have a personal interview with Mrs. Dickel, that you see her personally, is that correct?

A. I don't know that I used the word "insisted;" I should have said—

Q. (interrupting.) The suggestion came from you?

Yes, sir; not from Mr. Shwab, nor from Mr. Vertrees, but from me alone and first. My purpose in seeing her, the primary purpose that I had in mind in seeing her, or in suggesting that I see her, and in seeing her, was to determine, if I could, in my own mind, to my own satisfaction, that she was able to make such an agreement and was mentally competent to make that agreement. I certainly did not want to enter upon a trust arrange-

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ment of an important matter of this kind with a woman about whose mental competency to make it there might be some question arise afterward in litigation. That is why I went out to see her. I did not go out there primarily, if at all, for the purpose of taking up, item by item and in detail, the provisions of this trust agreement, and seeing if they were satisfactory to her, explaining it to her. I don't know whether that had been done by Mr. Vertrees and Mr. Shwab. It had been done by me with Mr. Vertrees and Mr. Shwab. I do not know of my own knowledge whether Mrs. Dickel up to the time I went to see her, had been consulted by anyone about this trust agreement.

She did not execute that trust agreement in my presence there in Nashville. I know who this gentleman who took her acknowledgment to that trust agreement is. Mr. Lawrence was and, I guess still is, Mr. Shwab's private secretary, bookkeeper, confidential clerk and advisor otherwise. I understand he had been for many years.

I think something has been said here about a letterhead of George A. Dickel & Co. Some of these letters of Mr. Shwab's are written upon the letterhead of George A. Dickel & Co. The letters are there. The first I ever heard of George A. Dickel & Co. was through Mr. Shwab and Mr. Vertrees, while I was there in Nashville.

Q. What is their business?

A. My information is it was a distillery.

My impression is they ran a distilling business or distillery. I have no knowledge whatever on the subject of whether George A. Dickel & Co., at the time I was there in Nashville and at the time of the execution of this agreement, consisted of V. E. Shwab, Mrs. Augusta Dickel and Mr. Shwab's son, George A. Shwab. I did not inquire of Mrs. Dickel and did not ask her what her purpose was in executing this million dollar trust agreement. I was not concerned in her purposes as much as I was in her capacities. As a matter of fact, I was not particularly concerned in her purposes. That was certainly either her private business or Mr. Shwab's private business or the private business of the parties in interest. I would not say that I did not inquire and that she did not tell me what her purpose was. We had, as I have said, a general conversation, and my recollection is, my best recollection is that she mentioned generally—

Q. (interrupting): Have you any recollection as to

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whether she told you what her purpose was?

A. Not definitely, no.

Q. If you remember, I want you to tell me; if you don't, I don't.

A. I don't remember.

I don't think I inquired of Mr. Shwab what his purpose or her purpose was in the execution of this million dollar trust agreement, but he told me. I did not know before I went down there, excepting what I got from letters. It largely concerned taxation. The letters are there; they speak for themselves. I say that he told me—he repeated and amplified on what he had said in the letters. When I asked, jokingly, how he came to select the Detroit Trust Company, he told me that he had made inquiries about the laws of the various states. I would not say how varied they were; pretty general inquiries, as I understood it, about the laws of the various states, he told me, on questions involving trust, taxation and other features in connection with matters of that kind. I don't remember what he said definitely, but the whole subject matter was discussed. The particular feature of the laws involving trusts, about which he had been inquiring of the various states, was the feature in connection with exemptions from taxation, from local taxes, I mean, and he found the laws of Michigan favorable in that regard, in that in Michigan you could pay a specific tax upon securities of this kind, a resident could. I did not tell him, subsequent to my first letter to Mr. Shwab in answer to his inquiry, whether it would be necessary for Mrs. Dickel to become a resident of Michigan, if she wished to avail herself of that law and have specific taxes paid upon this million dollars of bonds, to avoid general taxation. At that time I did not know Mrs. Dickel in the transaction at all. If her name was mentioned in the tentative draft of agreement, I probably knew about it then. I do not know whether it was or not. Her name was mentioned in Mr. Shwab's second letter, as I remember it. I do not know whether she changed her residence or at least claimed to have changed her residence. I did not inform Mr. Shwab in connection with Mrs. Dickel, abstractly, at any time, that it would be necessary for a change of residence to occur. I said in my letter—

Q. (Interrupting): The letter speaks for itself. That is the information you gave, is it?

A. Yes, sir; that is right.

I presume that was for the purpose of taxation also.

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I met Mrs. Dickel at Mr. Shwab's residence. I don't know whether that was at the West End or not. It is out in the residential section of the city. I believe it is called West End avenue. I think that is right. I am not sure. I understand his wife, Mrs. Shwab, is still alive. I presume she was living there then in that residence; I do not know. I met no one there besides Mrs. Dickel. Paul M. Davis introduced me to Mrs. Dickel. No one was present at my interview with Mrs. Dickel. Mr. Davis withdrew as soon as he had introduced me. I don't know whether he informed Mrs. Dickel of the object of my visit. He did not in my presence. I don't know whether he told her who I was; he did not in my presence. I don't remember whether I told her who I was. I was introduced to her and she apparently knew who I was. I don't remember whether I told her who I was or not. I don't know how old she was or is. She was a lady well along in years. She came into the room alone, sat down alone and got up alone. That is all she did while there except talk with me, that I noticed particularly. She was not lame, to my notice. I did not notice whether she had a lameness in one knee or knee-joint. I cannot say whether she did or not, then.

Q. Was she a large woman, fleshy or otherwise?

A. No, I wouldn't say she was fleshy, as I remember her she was quite tall and medium build perhaps.

Q. Do you remember anything about her color, the color of her skin or face?

A. No, I don't think I remember anything about that.

Q. You don't think you remember anything about it?

A. No, I remember she had a black dress on.

Q. The thing that you do remember in your conversation, the particular thing is, that you tried to impress upon her that if she executed this agreement she could not take it back. In other words, it would be irrevocable, is that right?

A. Well, I don't like the implication of what I tried; I did it.

Q. That you did it, then?

A. Yes, sir.

Q. That you remember?

A. Yes, sir.

Q. That is the most of what you do remember, isn't it, except that you observed and came to the conclusion she was mentally competent to execute the instrument?

A. Yes, sir.

Q. Did you read that agreement to her?

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A. I did not.

Q. I was going to ask you, when you came to that clause in the agreement that says, as I remember it, see if it is correct, in substance, that this agreement may be revoked by George A. Shwab—by Victor E. Shwab at any time, did you read her that clause?

A. I didn't read her anything.

Mr. Keeney: I object to that as not being a correct statement of the contents of the document.

Q. I was going to ask you and if I am not correct I will be pleased to read it, I don't want to misstate it.

Mr. Keeney: There is a provision in there—

Mr. Walker: Never mind, I will state it to him exactly.

Mr. Keeney: You state the subsequent clause in connection with it.

Mr. Walker: No, I will ask my question in my own way, unless the court rules otherwise. If I get the quotation correct; it probably don't amount to anything in view of the witness' statement.

A. I didn't read her anything.

The Court: As I remember the instrument, the substance of it is simply that the trustee may be changed.

A. Substituted.

Mr. Walker: That probably is the legal effect of it. I am not contending, saying now the legal effect, I was going to use the language, ask if she said anything about it. Here is where it says that this agreement shall be subject to termination at any time by Victor E. Shwab and George A. Shwab during the lives of both or by the survivor of them during his life, by reasonable written notice of such determination addressed to the Detroit Trust Company, Detroit, Michigan. The question I wanted to ask you, without getting into any controversy about its meaning; did you read that clause to her and did she ask any questions about it?

A. No, sir; I didn't read her anything.

I didn't read her any of it. I don't think Mr. Shwab wrote me a letter—I don't remember any letter in connection with his change of mind at the last minute, after I came from Nashville, as to some of the bonds to be put into the trust and sent us; some Commonwealth bonds in place of some of the others.

Q. You mean, do you, that instead of sending 204,000 of the railroad company bonds that were mentioned in the trust agreement that he sent you 50,000 less of those

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and included 50,000 of the Commonwealth bonds and said nothing about it?

A. I don't say that he didn't, I haven't got the letter with me.

I don't know whether he sent us such a letter or not. I don't remember whether he stated to us, either in the letter or otherwise, any reason for the change. I don't know anything about the reason for that change. I did not get any letter from Mrs. Dickel on the subject of the change of \$50,000 of her bonds. I never received a letter from her in my life. I have never had any communication with her in any way whatever; never saw her but that one time. I don't remember how the matter came up of Mr. Shwab telling me that this million dollars of bonds included in the trust agreement was not all of Mrs. Dickel's property, how he came to tell me that or what was the subject of the conversation. It was in the course of general conversation down there and I got the information from Shwab. If some of these vouchers are signed "Victor E. Shwab, by R. P. Lawrence," that is the same Mr. Lawrence who has already been referred to in my testimony as the private secretary or the secretary and confidential bookkeeper of Mr. Shwab. I saw him at the office of George A. Dickel & Company. I presume he was their bookkeeper and worked for them. The same gentleman was the notary public who took Mrs. Dickel's acknowledgment to the trust agreement.

Q. As a matter of fact, the Trust Company, that is, you and Mr. Stone as officers of the Trust Company, acknowledged the execution of this trust agreement on the 3rd day of June, 1915; it didn't become binding upon the trustee, the Detroit Trust Company, until that time, did it?

A. I considered it binding on us when I left Nashville.

Mr. Shwab didn't go with me to Mrs. Dickel's residence to see Mrs. Dickel. I remember that Mr. Geer, this gentleman here, was in Detroit to see me some little time ago and talked with me about it. I don't remember whether the date was about the 23d of April this year. He was not there to talk with me about my trip to Nashville and what took place there. He talked to me about the remittances of income that we had made under the trust. I think that on that occasion, in our office of the Detroit Trust Company, he asked me whether I went out to see Mrs. Dickel alone, and I think I said that I was accompanied by Mr. Shwab. I think so, because

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when I was in Nashville on the way home from the South, about three weeks ago, I stopped at Nashville on the way home and had a discussion with Mr. Shwab and Paul Davis upon that very point, and I said, "Why, Mr. Shwab, I thought you drove me out there." He said, "No, I didn't," and Davis then remarked that he had, and called my particular attention to the automobile drive that we had taken around the city and dropped me at the Shwab home, and that refreshed my recollection, and I remembered then that it was Davis who had taken me, and not Mr. Shwab. Offhand, I would have said I had been under the impression, up to that time, about three weeks ago, when I stopped at Nashville on my return from the South, that I went out with Mr. Shwab to Mrs. Dickel's or his house, although I had not thought anything about it particularly. That impression was changed by my conversation with Mr. Shwab and Mr. Davis, absolutely. I am absolutely sure now; I remember the occasion.

Dr. Robert Bruce Armstrong,

being sworn as a witness in behalf of plaintiff, testified as follows:

Direct Examination.

By Mr. Keeney:

I reside in Charlevoix, Michigan, and have resided there twenty-five years. My occupation during the entire time of my residence at Charlevoix has been the general practice of medicine. I am acquainted with Mr. and Mrs. Shwab and the members of their family. I have been acquainted with them six or seven years; something of that sort. I know what Mrs. Shwab's ill health has been since she has been in Charlevoix. Since Mrs. Shwab's stroke, I have seen the members of the family quite frequently. The first year she was there, I think I was there nearly every day, if not every day. When I say "Mrs. Shwab's stroke" I mean paralytic stroke. Since that stroke, when the family has been in Charlevoix in the summer, I have seen a great deal of them. I was intimately acquainted with them as much as I can be. I know their children. I am acquainted also with Mr. and Mrs. Shwab's grandchildren. In April, 1915, four years ago last April, there were children then living who were the children of the children of Mr. and Mrs. Shwab, the grand children of Victor E. Shwab and his wife. Mr. Felix Shwab had two children, I think,

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Mr. Hugh Shwab had, I think, two, and Mr. Lindenberg, I think the name is, I think they have two, one or two.

I knew Mrs. Augusta Dickel in her lifetime. During the summers when I was there at the Shwab home, attending upon Mrs. Shwab, I saw Mrs. Dickel frequently in her lifetime. I got to know her quite intimately. I think the date of her death was September 16, 1916. As I remember, Mrs. Dickel was ill about two weeks prior to her death; possibly a bit more. She had her first signs of the trouble about two weeks previous to her death. I was at Charlevoix at the time of her death. She died at Charlevoix. Prior to this last illness of hers, which, as I recall it, occurred a couple of weeks or thereabouts before her death, in my judgment her state of health was very good for a woman of her age. Her mental condition was always good.

Q. How about her temperament, and judgment, what can you tell us in that regard?

A. Very placid even temperament, and a very charming woman, very gracious woman.

Q. Whether she was of cheerful disposition or otherwise?

A. Always seemed to be that way.

I saw her every summer that she was there. During the summer of 1915 I saw her frequently. The state of her health at that time appeared to be good.

Q. Was there anything, so far as you could perceive, at that time, that gave any reason for the belief that she would not continue to live for a number of years?

A. From her appearance she was a person of good health. I might say that I never examined her closely or thoroughly until her last illness.

The relations which existed between Mrs. Dickel and Mr. and Mrs. Shwab and their children always seemed to be of the most pleasant kind. She always called Mr. Shwab "Mannie" in sort of an affectionate way. She never discussed him personally with me, but when she spoke of him she always spoke of him as "Mannie." I am not able to say whether she appeared to confide in him as regards business matters. I don't know anything about their business affairs. The only thing I had to judge about was the appearance—the family relations; that was all. The family relations always seemed to be of the very best.

Cross-Examination.

By Mr. Walker:

The name of the cottage that the family occupied was

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"Breezy Point." The son-in-law, Otto H. Lindenberg, also had a cottage there one year. I don't think that every year he was there during the same length of time that Mr. Shwab and Mrs. Shwab and Mrs. Dickel were there.

Q. More than one year?

A. Yes, they were there more than one year.

Q. Any of the other married members of the Shwab family occupy cottages there or did they all live in these two?

A. No, Mr. Davis had a cottage, they lived alone; Mr. Lindenberg, I think, usually had a cottage when I saw them when they were there.

Q. Any one of the other members of the family?

A. Mr. Hugh Shwab had a cottage also.

Q. Mr. Davis was a son-in-law, married a daughter of Mr. and Mrs. Shwab?

A. Yes.

Q. Mr. Lindenberg married a daughter of Mr. and Mrs. Shwab, they each had cottages some of the seasons anyway?

A. Yes.

Q. And Hugh Shwab had a cottage, he lived with his wife and children?

A. Yes, sir.

Q. These two children, by the way, how old are they now, of Hugh Shwab's?

A. One of them is dead.

Q. When did that child die?

A. Why, I think it died a year ago, at least I heard it was, the child had diabetes.

Q. How old was it?

A. I think about 13 when she died.

Q. And the other one?

A. I think, was about 7 or 8, I think.

Q. Now, you mean?

A. No, I think he was about 7 or 8 then.

Q. Mr. and Mrs. Shwab and Mrs. Dickel occupied a cottage together?

A. Yes, sir.

Q. At Breezy Point, you say?

A. Yes, sir.

Q. And any of the other members of the family with them in that same cottage?

A. Why, I think the son was there, one of the sons. Mr. Felix, I forgot about him, too, Mr. Felix Shwab, he

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has some children, too, he has a boy, I think, and a girl.

Q. They lived in the same cottage?

A. Mr. Felix did, but his wife wasn't up there, the family wasn't up there every year, he was there with them.

Q. All as one family?

A. Yes, they lived there, he lived with them.

Q. That you call Mr. Shwab's cottage?

A. Well, that was the cottage they occupied that year. Mr. Shwab, I understand, owns another cottage since his wife has been ill.

Q. I mean that year?

A. That year they occupied that cottage.

Mrs. Dickel lived with Mr. and Mrs. Shwab in their cottage, and had for a number of years since I first knew them, up to the time of her death. She died there in that cottage at Breezy Point. She was living there as a member of the family. She complained of rheumatic affection, she called it, with her knee; rheumatic knee. That is what she called it. She had occasional attacks of indigestion or constipation; rather sedentary in her habits. She said she had some constipation. I think I gave her some pills or something of that kind; some laxative of some sort at different times. I don't know just how long ago; several years ago.

Constipation in a person of that age, of sedentary habits, is not detrimental to health. Constipation means that the excretions of the body don't pass off readily, as they should, through the bowels, but there are lots of people—

“Q. Is that a fact?

A. She claimed it was; I don't know.”

I occasionally gave her pills.

“Q. Constipation means that the waste matter that should pass off from the bowels does not pass off as readily and easily as it ought?

“A. No. If it is retained in the system, it is supposed to be one of the causes tending to what we call auto-intoxication or poisoning; tends to poison the system from the waste matter remaining. I know lots of people and find lots of people who are constipated and whose bowels don't move for a number of days, who apparently are in very good health. I do not always favor that condition as a physician.”

I looked at the knee; I was not able to determine what was the trouble. Rheumatism is very much of a general term. What we call “rheumatism” or what this was,

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if this was a rheumatic knee, might arise from any one of a half dozen causes.

Q. Causes which might not tend to good health; that is, it is not a good symptom, is it?

A. No.

The cause of her death, or, as we say, what she died of, was apoplexy. Apoplexy really means the bursting of a blood vessel, but not all cases of paralysis are apoplexy. You have to put this down as something of that sort. Of course I put it apoplexy because she died with a paralysis. She either had a ruptured blood vessel or a thrombosis. Thrombosis is a plugging of the blood vessel that stops the circulation. I don't know as it clogs the heart. That will depend upon the degree that it reaches. If it was thrombosis, it probably extended, involved the vital centers of the brain and then she died, so the effect was the same in either case.

Q. As a matter of fact, medically speaking; and in your judgment, at the time her death was caused—was due to what physicians call hardening of the arteries or arteriosclerosis, was it not?

A. Well, it probably was the result of that.

Q. I mean as a result of that, that was the primary cause?

A. That was in my judgment. Hardening of the arteries or arteriosclerosis is the medical name. It is a deposition of scarlike tissue in the blood vessels, fibrous tissue in the vein, and scarlike tissues, the same tissue you see in a scar. Sclerosis can come—for instance, you have an increased tension of blood in the veins and it is long induced; you can get a deposition of scar tissue in there, on account of the effort of the blood vessels to overcome that, don't you see? The constant straining of them is apt to bring that on. A man may have a deposition of calcium in the blood vessels and not have a blood pressure. For instance, if a man has some infection or something that brings on an inflammatory trouble in the walls of the blood vessel, if it is long continued, he will get lime salts deposited in it, but the vascular system, to adjust itself to an increased blood pressure, thickens up, gets harder with this scar tissue.

She did have high blood pressure just before she died, when these symptoms first came on. That was in the last illness, about two weeks. She then had symptoms of her apoplectic stroke. She did not have hemiplegia or anything of that sort. She had an inability to articulate well and she did not move one of her hands well.

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Afterwards it developed into that. That caused unconsciousness; she lapsed into unconsciousness and ultimately death ensued. When I first came, she had not reached that stage. She had the effects of it in some inability to speak plainly and also in the lack of the use of one hand or arm. - I then took her blood pressure. It was rather high. I think it was 180 or 190; something of that sort. It was not 270 and I did not tell Mr. Geer so. I never saw but one person in my life—

Q. Wasn't it a fearful blood pressure?

A. No, no.

Q. Didn't you use that expression—

A. I said a very high blood pressure. I never saw but one blood pressure in my life that went 270.

Q. I didn't ask you that; did you make a record of the blood pressure?

A. No, I didn't; I had no occasion to.

I remember that she had the high blood pressure. I recall it was high blood pressure.

Q. 170 or 180 is not very high in a person of her age, is it?

A. Under certain conditions, yes.

The normal blood pressure or about the normal blood pressure of a person of her age, 77 years old, or 78, as the case may be, ought not be—we begin to look for trouble when it goes over 160. 20 is rather a big jump when we add a little bit to it. I don't ever remember that when I first took it, that occasion when I attended her in the last illness, it was 270. I only remember of one case I ever had, I think—

Q. I am asking you about this case.

A. If I never had but one, it could not have been any other one.

I had a talk with Mr. Geer when he came to see me last April. I told him she had a blood pressure. I don't remember of ever telling him she had 270, because I never saw but one. I did not tell him in the course of that conversation that it was a fearful blood pressure; did not use that expression. I did not tell him that I took it and that it was 270.

I think I signed a death certificate. I had to as the attending physician in her last illness. I think I assigned the cause of death in that death certificate as apoplexy.

Q. Here is what purports to be a certified copy; I haven't the original; I show it to you and ask you to re-

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fresh your recollection from it, if you can, and state whether you stated it.

A. That is the results of arteriosclerosis.

That refreshes my recollection as to what I signed, that the cause of death was as follows: Results of arteriosclerosis. That is as near as I could judge it at that time, as the attending physician. That meant the deposit of matter like scar tissue in the blood vessels. One of the effects is that it clogged the blood vessels and prevented the circulation. That is not the only effect. Other effects depend on the party of the body that is affected. In her case it happened to be the brain; the blood vessels in the brain. Another effect besides the clogging of the blood vessels is that a man may die with heart trouble with it. She did not die of heart trouble. I guess I misunderstood you. I thought you asked me if there were any other effects from arteriosclerosis; I was giving you the things that can occur from arteriosclerosis in other cases. There was no other effect in her case, except this stroke of apoplexy. Arteriosclerosis often leads, together with high blood pressure, to a bursting of the blood vessel. That is a danger, and it often happens. The blood vessels do sometimes become brittle or hardened, and if high blood pressure ensues, whatever the cause of it may be, there is a danger of the blood vessels not being able to stand the high pressure and of their giving way or bursting. Then hemorrhage ensues, bleeding, bloodclot, and if in the brain, not absorbed, it is very likely to cause death. It is what we call apoplexy. She died of apoplexy, a lesion in the brain, induced by arteriosclerosis, as near as I could diagnose it at the time. I do not know, from what I saw of her and my general knowledge of such disease, as to how long standing that condition of arteriosclerosis, resulting in her death, and of high blood pressure in connection, was. I do not know as to either the high blood pressure or the arteriosclerosis. I have no opinion upon the subject. I will say this: When you don't examine a person, the only thing that you have to judge about a high blood pressure are some of the symptoms that go with it. A person may be in the very best of health, may be able to do work of all sorts, mental and that sort of thing, no signs of high blood pressure, unless they are examined. Unless they are examined, you don't find that out. I did not examine it; did not take Mrs. Dickel's blood pressure until that time, so I didn't know.

I saw her in June, 1916, the last year of her life.

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Q. Your certificate here says that you attended her from June 1st, 1916, to September 16, 1916, is that correct?

A. I saw her off and on.

Q. I didn't ask that, did you attend her from June 1st, 1916, to September 16, 1916, the day of her death?

A. Not for that trouble.

Q. For any trouble did you attend her as a physician?

A. Yes, I saw her—

Q. For what?

A. Well, I gave her some treatment for her knee.

Q. What treatment did you give her for her knee?

A. Hot packs.

Q. Before you gave her any treatment for her knee you examined it and attempted to diagnose the cause, did you not?

A. Yes, sir.

Q. Did you diagnose the cause?

A. Nothing, excepting she had pain in the knee.

Q. You couldn't arrive at the cause?

A. No, sir.

Q. You don't know now the cause?

A. I don't.

Q. Something back of the knee, wasn't it?

A. Something; how do you mean?

Q. If it was rheumatic trouble, the cause lay back of the knee itself; that was simply a symptom; simply an effect.

A. You mean in the knee?

Q. Something that was not in the knee?

A. No, the trouble was in her knee; that is where she had her pain.

Q. That is where the pain came out?

A. Yes.

Q. The cause might have been in the body, in indigestion, in the blood vessels or in other things, might it not?

A. Well, it might have been that.

I don't remember whether she had that knee when she was there the year before. I don't remember at all whether she had a lame knee or a bad knee or a rheumatic knee ever since I knew her. I cannot say one way or the other. I don't remember of having attended her for that at all. Besides the rheumatic knee and the apoplexy, that is, the last illness, I think between June 1, 1916, and September 16, 1916, I gave her something for her stomach; something to aid her digestion; some-

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thing of the sort. I don't recall just what it was. I came to do that because she asked me for something. She just said she had a little gas, or something of the sort, as people frequently do. I did not make any diagnosis or examination of that. She was a very healthy individual from the first day of June to the sixteenth day of September, 1916, aside from the knee.

Q. The bad knee and the stomach, the bowel trouble, is that right?

A. Yes.

Q. The year before had you given her anything at all for indigestion, or anything else?

A. I don't know whether I did or not; I don't know, sir.

Q. Have you looked on your books since Mr. Geer was there?

A. I haven't any record of the account at all; it was paid up.

Her last illness I charged to her on her estate, but that was all paid up, you know, and then I did not keep it at all. I have no record of charges made from the first of June up to two weeks before her death. Those were destroyed when they were paid. I did not take her blood pressure more than once. That was when I was first called in her last illness.

As a general rule, as people grow older, there is always more or less of arteriosclerosis development in the physiological condition. One cause is, of course, old age as it comes on. That is one of the causes, but it is not the only cause of high blood pressure. High blood pressure can be induced by any poisonous substance or some poisonous substances that are retained in the body. For instance, a woman, a pregnant woman who has eclampsia, will have a very high blood pressure, threatened with puerperal convulsions; so any person who has any poisonous excretion or substance in their body, that might be one of the causes. Chronic indigestion might lead to that, or chronic constipation. It might be the tendency of it. If a person with high blood pressure came to see me and I found out what the state of their pulse was and the action was, I would try to keep the eliminatory organs always open and also the kidneys.

Q. Be highly important. Then if a person, as they grow old, say 70 and more, is of sedentary habits, a fairly hearty eater, and when I say sedentary habits I suppose we all understand that, not active, not up and about actively, not out of the house very much, and

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troubled with indigestion, that might aggravate the hardening of the arteries due to old age, might it not?

A. It might.

She did not walk very much. She was rather stout and she was troubled with rheumatic knee. I don't know anything about whether, either for that reason or others or both, she had turned the management of her business affairs over to her brother-in-law, Mr. Shwab. I know nothing about their business affairs at all. I have seen her get out of the cottage. She could walk around some, but very little, you know. She walked to her meals. She walked lame that last summer. I think she used a cane part of the time. I don't remember of her complaining of the rheumatic trouble or the knee trouble before the last summer. I didn't know she had such trouble.

When she came there the last summer, she also had a broken arm. I do not think that caused her death in any way I know of. She did not tell me how she got it. I imagine she fell, on account of the fracture. It was a Colles fracture. It looked to me like a fracture resulting from a fall.

Q. Does a person who has arteriosclerosis ever have dizzy spells?

A. Yes, sir.

Q. That is one of the rather common symptoms of that disease, is it not?

A. Yes, sir.

Q. Vertigo, sickness of the stomach of some kind, sometimes dizzy?

A. Dizzy.

Q. Coming and passing off. You don't know whether that caused the fall or not?

A. I don't know anything about it. That occurred before she came up there.

Q. But the broken arm—you have answered that. Just a question or two more and I guess I am done. To refresh your recollection now, isn't it your recollection at this time that you did take Mrs. Dickel's blood pressure the year before, that is, the year 1915?

A. I never took her blood pressure before that time.

I have been clear upon that point right along. I think that is what I stated to Mr. Geer when he interviewed me in April. I don't think that I said to Mr. Geer in that interview that I could not recall definitely whether when attending her prior to her last illness I observed the high blood pressure and I don't think that I said

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that I rather thought I had observed this high blood pressure during a previous summer, when I was in Charlevoix. I don't ever remember taking her blood pressure except that time. I don't remember whether I did not so state, in substance, to Mr. Geer. He did not see me at my office; he saw me at the hotel there one evening. I don't remember whether he asked me to try to refresh my memory upon that point and advise him as to the result, as to what my conclusion was. I did not communicate with him further after he left there.

Q. With the high blood pressure that Mrs. Dickel had in the summer of 1916, that you took when you were called to her last illness, is it or is it not possible that she was aware of that condition or at least of the symptoms of that condition, some of the effects of that condition before the year 1916, a year or two before?

A. Well, she wouldn't be aware of them, I don't think, unless someone told her, because most people—

Q. A person knows when they are dizzy?

A. Yes, but that is not always a sign of high blood pressure.

Q. One of the signs?

A. Yes.

Q. A person knows when they have vertigo, do they not?

A. Well, that is dizziness.

Q. That is dizziness?

A. Yes.

Q. Is it?

A. Yes, sir.

Q. Isn't it another effect for sickness of the stomach?

A. No, sir.

Q. It is not?

A. Nausea.

I could not tell you whether Dr. Osler gives dizziness and vertigo as two of the symptoms. I ate with Mrs. Dickel, at the table with her, at their home in Nashville. I don't remember what fall that was. It was the time I went down there with Mrs. Shwab and she was ill. I went home with her a year or two before Mrs. Dickel's death. I don't recall the number of meals. I was there for a week or ten days. It was usually breakfast, because we were not at home. I was away shooting the balance of the day and I would not get back again. I don't recall that I noticed whether she was a hearty eater or otherwise. I am Mr. and Mrs. Shwab's physician now in the summer time. They are there several

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months out of the summer. I did not see any difference after 1914, when she became a resident of Charlevoix, whereas before she had been a resident of Nashville, Tennessee, from what I had noticed before 1914, in regard to where she had lived or the manner of living or length of her stay or anything while she was at Charlevoix.

Q. I notice this certificate gives the date of birth; that is one of the facts that the law requires you to include in the death certificate?

A. I don't usually fill that side out.

That is one of the facts that is required to be given in the death certificate. I don't remember who filled this side out. I don't remember whether I filled it out at the time or not. This side I filled out. Often I don't fill it out. The undertaker very frequently brings this part filled in and then I sign this side. I don't know who the undertaker was. I don't know whether I filled in the date of the birth there or not. If I did fill it in, I couldn't tell you from whom I got it, because I don't know whether I filled that part in or not. I did not, that I remember of, ask Mr. Shwab the date of her birth. I didn't know the date of her birth before her death. I knew how old she was, of course, just in round numbers, just in round figures.

Q. This says May 1, 1836, what do you know about that—anything?

A. I don't know a thing about it, sir.

Q. It says she was 78 years, four months and 15 days, which would be wrong by one year; do you know who filled that in?

A. I don't.

Q. I mean wrong by one year on that date of birth. The place of birth; did you get the place of birth?

A. No, sir; I don't know where she was born.

Those things on this other side I filled in; this other part as to the length of attendance and the dates when I last saw her alive, the cause of her death.

Q. It calls here for the contributory or secondary cause of her death; you filled that in, did you not?

A. Well, the age.

In my judgment her age was a contributory cause of her death. This condition occurs so frequently in old age. She was a person of old age, what I would call old age. And as old age approaches, I am not surprised to find that condition. That is one of the causes of what we call senility.

The day Mr. Geer was there, I agreed to meet him in

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my office the next morning, after trying to refresh my recollection. I did not meet him. I found a letter under my door from him, asking me to look the matter up and let him know.

Redirect Examination.

By Mr. Keeney:

Q. Doctor, you say that you didn't notice any difference in Mrs. Dickel's manner of living after 1914. Do you recall or were you aware of the fact that she bought a residence at Charlevoix in 1914?

A. No, I was not. I knew that there was a home bought there, but I didn't know who bought it or who owned it.

I don't know whether she took title to any property there in that year. I don't know whether it was for the purpose or with the intent of perfecting her residence at Charlevoix or not.

Q. In response to a question that Mr. Walker asked you, you said that Mrs. Dickel would not be aware that she had a high blood pressure unless somebody told her that she had, did you ever tell her that she had a high pressure?

A. I never did.

Nobody ever told her that she had a high blood pressure, so far as I know of. I was not aware of it myself until her last illness in the latter part of the summer of 1916.

Q. You say that you had one patient, as I understood you in response to a question Mr. Walker asked you, that you had one patient who had a blood pressure as high as 270?

A. My sphygmomanometer, that is the blood pressure instrument, registers 280, and the pulsation was still in the arteries when it went beyond 280.

So the blood pressure in that case must have been as high as 280 anyway. That case was five or six years ago. The patient is still alive. The patient was a woman, with a blood pressure five or six years ago of 280, and she is still living.

I do not know how many times in 1916 I prescribed for Mrs. Dickel some pills of some sort for indigestion or constipation. Nothing seemed to be serious about those ailments to which I refer, the indigestion and constipation, except she would complain of it. She would just say that she would like something to move her bowels; she would say, "I have got a little gas," or something of that sort, and just to please her I would give her

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something; that was all. This prescribing for people for indigestion and constipation is a very common thing among members of the medical profession, without regard to whether the patient is young or middleaged or old.

Q. Part of the daily life, is it not, of the ordinary practicing physician?

A. He is very apt to give them something without examination if they complain they have got something of that sort.

Recross Examination.

By Mr. Walker:

These ailments of indigestion or gas in stomach or gas, as a person grows old, along in years, are liable to be more serious matters than in a younger person. Every year, as a person grows older and their hold upon life more feeble, it is more serious. They are not to be treated lightly. I did treat them lightly in that case, I am sorry to say. She would just say she had a little gas; if I couldn't give her something for her bowels, and I would give it to her; I didn't examine her at all. I should have done it. She would occasionally complain of it; not all the time. I think Mrs. Johnson, this patient I speak of as having 280, was 72 or 74 years old. It was chronic. I saw her last summer and I think it was about 240 to 260 last summer. 240 last summer I think it was. I do not know that that is one case in a million. I could not say that is one case in ten thousand.

Q. It is extremely rare that a person could have that blood pressure at that age and recover or live for five or six years?

A. That blood pressure is extremely rare anyway.

Q. I say if they had it, it is still rarer for them to live, isn't it?

A. I cannot speak from a personal experience. They are in a very dangerous condition; I will say that.

I kept Mrs. Johnson very quiet. She went in a wheel chair. She never had apoplexy. The only signs that affected her from that was rather a weakness of the heart. She was very short of breath on exertion. She knew she had it; she was very careful.

Miss Maude Schell.

The deposition of

Miss Maude Schell,

a witness in behalf of plaintiff, which deposition was taken at Nashville, Tennessee, on February 25, 1919, was read in evidence by Mr. Amberg.

Direct Examination.

By Mr. Vertrees:

I reside at No. 822 Fairview Avenue, Nashville, Tennessee. I have resided in Nashville nine years. I am engaged in the profession of nursing, a professional nurse. I have been a professional sick nurse nine years. I am acquainted with the plaintiff, Mr. V. E. Shwab, and his wife, Mrs. Emma Schwab. I was acquainted with Mrs. Dickel, deceased. She was a sister of Mrs. Shwab. I made the acquaintance of Mrs. Dickel in April, 1915. I was called in to nurse Mrs. Shwab. Mrs. Dickel, at that time, was in Mr. Shwab's home. She was a member of his household. I was called in there to nurse Mrs. Shwab and there I made the acquaintance of Mrs. Dickel. I was called in there as a nurse for Mrs. Shwab the second week in April, 1915. I remained six weeks.

I know that at that time Mrs. Shwab, Mr. Shwab and Mrs. Dickel were contemplating a visit to some place, or leaving their residence for some other place. They were going to Charlevoix, Michigan. I did not accompany them. My duties there were to look after Mrs. Shwab. I was not called in at any time to look after or see or to nurse Mrs. Dickel. The state of Mrs. Dickel's health at that time, while I was there, was good. I was thrown with her a great deal. I spent from two to three hours with her in the morning in her room, and a great deal of time in the afternoon. Mrs. Shwab went for a drive from about 10 to 10:30 to 12:30 or 1 o'clock, went out riding and to picture shows and things up town, and I would stay with Mrs. Dickel while she was away.

Q. Do you know as to Mrs. Dickel's physical condition, and I will ask you especially in the matter of taking baths. Did she have any assistance, or did she do that herself.

A. No, sir; she did not have assistance, she did everything for herself. Her room was upstairs. Her usual habits as to going up to her room and going up and down stairs were that she never used the elevator. Mr. Shwab had an elevator in his residence. It was in use by those who saw fit to use it. Mrs. Shwab used it altogether. Mrs. Dickel did not use it. I mean she walked up and down the steps.

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During the day Mrs. Dickel read a great deal, and she went out on drives. I don't remember whether she drove daily. She did drive frequently. She went out often, but I don't remember about daily; usually accompanied by some member of the family. I did not ride with her at the home.

I was not called in at all to look after Mrs. Dickel. She was not ill or sick while I was there. Dr. Oughterson was the physician then attending on Mrs. Shwab.

The state of Mrs. Dickel's mind during that time was all right.

Q. Was there anything especially depressing her? A. No.

Mr. Walker: I will object to that; incompetent, not qualified to answer; move to strike it out.

The Court: I think that may go out.

Mr. Amberg: I will note an exception.

She did not at any time discuss the question of death or anything like that with me, as if she thought it were imminent or that she was apprehensive of it, unless it was her joking about death. By making a joke of it, I mean she was always discussing her unusually good health, but she never mentioned dying herself. She was very proud of her good health. She was about 78 years old, I believe.

The relationship, so far as feeling and devotion were concerned, between her and her sister, Mrs. Shwab, was that they were very much attached to each other. Mrs. Dickel did not have any children. She did not have any relatives other than Mrs. Shwab, to my knowledge.

Mrs. Dickel talked a great deal of traveling. She had been to Europe six or seven times. She discussed at this time the question of her going again. Mrs. Shwab's condition, I think, detained her and prevented her going. Mrs. Shwab's condition at that time was very bad. That was in April and May, 1915.

I remember the circumstances of some wills being executed at that time out there, or about that time. Those wills were Mrs. Shwab's and Mr. Shwab's and Mrs. Dickel's; all three. They were executed at the same time, at the home. By "at home" I mean at the Shwab residence in Nashville, Tennessee. I was a witness to those wills.

Q. Do you know how they came to be executed at that time and all together? Was it explained in any way, for your information?

A. It was owing to Mrs. Shwab's condition.

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Q. What do you mean by that; what was the idea?

A. Her condition was so bad at that time.

Q. That her will was made because of her bad condition. Do you know why the others were made at the same time, that is, the will of Mr. Shwab and Mrs. Shwab and Mrs. Dickel; did you know anything about that?

A. Well, they made theirs in order to protect Mrs. Shwab, wasn't it? Her condition was so bad at that time they wanted to get the business straightened out and they had to be very careful about exciting her, and the idea was to get everything straightened up.

At any rate, I witnessed all of them. I don't remember when that was, the date. It was some time in May. They went to Charlevoix, Michigan, June first. I left them June first. Mrs. Dickel did not discuss with me in any way the will. Mr. Hager was one of the other witnesses to the will. Mr. Vertrees was another. There were three.

I went to Charlevoix, Michigan, with a member of the Shwab family in 1916. I then accompanied Mrs. Dickel. I went in the capacity of a nurse to Mrs. Dickel, as a professional nurse. Mrs. Dickel's trouble at that time was a fracture of the arm. It was broken about ten days before we left. We left June first and this was fractured some time in May, June 1st, 1916. I went as nurse to Mrs. Dickel. Some one went with Mrs. Shwab. It was Miss DeVault. I remained up there with Mrs. Dickel from June 1st until August 5th; then I left. I left because I had an engagement here. Mrs. Dickel had been in bed a couple of days when I left; her condition was not very good, but up until a couple of days before it was. I don't remember whether she recovered from the fracture or not. I don't remember what her trouble was then, those two days before I left.

Mrs. Dickel died in September, 1916. I did not see her any more between the time I left Charlevoix and the time of her death. I never waited on Mrs. Shwab any other time after that. My association with Mrs. Dickel was at these two periods that I have stated.

There was nothing in Mrs. Dickel's conversation or conduct that I saw to indicate she had any apprehension of impending death during the year 1915, at the time I have mentioned. Her disposition was very cheerful. In the matter of capacity, she was an unusually sensible woman. She said something about my going to Europe with her; she told me as soon as Mrs. Shwab was better, she would probably make a trip to Europe and I would

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be with her. There is no other matter or thing about this matter that you have not asked me about that would be of benefit to either of the parties that I know and which I think should be stated that I now recall.

Cross-Examination.

By Mr. Littleton:

These wills I have spoken of, of Mrs. Shwab and Mr. Shwab and Mrs. Dickel were made in May, 1915. I don't remember the date. I say Mrs. Dickel was a very intelligent woman with respect to the affairs of her estate, and kept interested in those things. I never talked to her about the deposit of any of her estate in the State of Michigan. She did not refer to that at all. I knew that she and Mrs. Shwab's wife, her sister, were very close to each other. She did not have other sisters living at that time. Mrs. Paul M. Davis was not Mrs. Dickel's sister. She was Mrs. Shwab's daughter.

She never discussed her affairs or her estate or anything of that kind with me. She seemed to be dependent on Mrs. Shwab in the administration of her affairs.

Mrs. Dickel never did do anything other than take ordinary exercise and things like that. I don't know anything at all about any of the affairs of Mrs. Dickel's estate. She changed her residence to Michigan to accompany Mrs. Shwab. Mrs. Shwab was going there because she was very ill at the time. They were going up there just for the summer. There was no person that I know of dependent upon Mrs. Dickel for support. I don't know whether or not Mrs. Shwab's children had everything that they needed without looking to Mrs. Dickel for anything. Mrs. Dickel was a good business woman and had good judgment. I do not know whether she had her own bank account or not.

The deposition of

Dr. William Alexander Oughterson,

a witness in behalf of plaintiff, which deposition was taken at Nashville, Tennessee, on February 25, 1919, was read in evidence by Mr. Amberg.

Direct Examination.

By Mr. Vertrees:

My age is 44 years; residence, Nashville, Tennessee. I will be 44 years old my next birthday. I have resided in Nashville since 1902, sixteen years. I am a physician by profession, in active practice. I have been practicing at Nashville twelve years. I am acquainted with the plaintiff, Mr. V. E. Shwab. I have known him for about

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four years. Of course, I have known him more, ever since I have been in Nashville, but he has not known me. I am acquainted with his wife, Mrs. Emma Schwab. I have known her four years. I have been called in as a physician to treat some members of Mr. Shwab's family, Mrs. Shwab and Mrs. Dickel. I have seen Mr. Shwab in sort of a friendly way before that. I could not give the exact date when I was first called in to see Mrs. Shwab, but about four years ago. That would be in 1914. I am not exactly certain what time in 1914 it was; possibly a little over four years ago, but less than five years ago. It was in the year 1914.

Q. Were you at any time called in to treat Mrs. Dickel?

A. I saw Mrs. Dickel on several occasions; occasionally only.

She lived with Mr. Shwab in the same family. I knew nothing more than an external view of the relationship between Mrs. Shwab and Mrs. Dickel. As to the relationship, they were sisters. Mrs. Dickel was a widow. I recall that in the year 1915, I was treating Mrs. Shwab and treating her as their family physician at intervals all during the year, with the exception of the summer that I think she was in Charlevoix, Michigan. She went to Michigan the latter part of May; it might have been as late as the first of June, but I think the latter part of May. During the months in 1915 previous to that, that is January, February, March, April and May, I saw Mrs. Shwab as her physician. My attendance upon her was pretty regular during that time. I saw her about three times a week, and on one occasion three or four times a day, for quite a number of days and maybe two weeks. She had an acute attack of intestinal indigestion and was very ill for about two weeks and had several doctors in attendance. I would not say whether that was March or April, 1915, but it was toward the spring months. That is a thing I would not be sure about. That is the best I can remember. My best recollection as to her condition in May, 1915, is that it was not good. As a matter of fact it was so bad we all were very apprehensive of her end being near. We advised her husband as to the gravity of her situation.

During that time, that is, the months of April and May, 1915, or I will say all of 1915, from January 1st up to June 1st, 1915, I never saw Mrs. Dickel when she was ill. She would have little attacks of constipation; that was all I treated her for. She had no other physician but me that I know of. She was not under any regular treat-

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ment at any time during that time. She led a rather sedentary life and would occasionally get constipated. I was visiting Mrs. Shwab there. I saw her frequently, socially; very frequently, but not specially. I saw her socially very often on my visits there, and conversed with her; nearly every day I had a word or two with her. I think there was a very kind feeling between her and her sister, Mrs. Shwab, from my conversations with her. I think Mrs. Dickel was one of the brightest women, mentally, that I have ever met, and the most sensible and reasonable one I have ever met. As a matter of fact, her reason was so good that you hardly classed her with the average woman. As to her sight and hearing, everything was perfectly normal so far as I can recall. Her age was in the seventies; I would not say exactly how old she was; about seventy, the best I can remember.

Q. Did she, at any time, discuss with you the question of death or her apprehension about death being imminent, or having to go soon, or anything like that?

A. No, she never had any such thought, or if she did, she did not discuss it with me.

Mr. Walker: I move to strike out the statement; it is not responsive.

The Court: The first part may go out.

Mr. Amberg: I note an exception.

Q. As to her disposition and her cheerfulness and hopefulness, and the like, how was she.

A. Always so. I knew that she had made some visits to Europe. She had been to Europe on more than one occasion, as I remember, and I remember she commented on the war situation, hoping it would be over soon; that she had planned to go to Europe and wanted to take some baths for a little stiffness in her knee and thought she could get benefit by going to Naueim for the baths—that it would cure her knee. She did not, at any time, discuss in detail any of her business affairs with me; just in passing only. I don't recall if I was present at the time she and Mrs. Shwab and Mr. Shwab made their wills.

I think the last medical advice I gave Mrs. Dickel subsequent to that was for a fracture. She fell and broke her arm, had to have an anaesthetic and was upset for a few days, and I saw her during that time. I don't remember the date, but it was about the time they were ready to go to Charlevoix, Michigan. She was apprehensive that their plans might be delayed. If I remember correctly, it was in 1916. That was the year she

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died. It was the same year she died. She died at Charlevoix. I recall that that fracture happened the same year she died, but it was previous to going to Charlevoix, Michigan. I never saw her after that. I was then called in to administer some anaesthetic. Dr. Duncan Eve was doing the setting of the arm. There was no other physician than I treating Mrs. Dickel at that time. There was nothing else except that fracture the matter with her so far as I know. Her mental attitude was good; as clear as could be. She was not at all despondent or apprehensive. She just hoped she would be able to get away and not delay the plan of going to Michigan.

I think I called in Dr. Eve. I was the attending physician, but I was not a surgeon. Mr. Shwab called me to see Mrs. Dickel following this fall, and I saw she had a fracture and I called in Dr. Eve. It seems to me she caught her toe on the rug and hit her flat hand on the floor. She had one stiff joint. I never knew whether it was rheumatism or an injury to one of the cartilages, but she complained of a stiffness in the joint.

I made out a sworn statement to you, as Mr. Shwab's attorney, some time ago, an affidavit, at the request of Mr. Shwab, which he said he wanted to file or forward to the officials at Washington. I could not give you the exact date when that was.

Q. I have a copy before me, and I see it was sworn to the 6th day of March, 1917. What I want to ask you was this. I see you put down here, the statement was typewritten, but there is a notation in handwriting which I take it is yours. Look at it and see. That is a photograph of the affidavit.

A. Yes.

Q. Now, I call your attention to the last clause and ask you to see if that refreshes your memory in any way. You say, in looking over my records, my first professional visit to Mrs. Dickel was March 17th, 1915, but had discussed her rheumatic trouble with her in a casual way, some months prior to that during my visits to Mrs. Shwab. I see here you say your first visits to Mrs. Dickel was March 17th, 1915. Does that enable you to fix the date about when that fracture might have been?

A. No. The fracture was in 1916.

Q. Do you remember what that first visit was?

A. To Mrs. Dickel?

Q. Yes.

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A. I don't recall ever having given her anything except a little purgative medicine.

I can only emphasize this, Mr. Vertrees. I thought that mentally she was one of the most exceptional women I ever met. You know, women, most women, have views that are not quite consistent with the average views of men, but I thought Mrs. Dickel had the fairset minded view of things in general of any woman I ever met; very just in all her criticisms and conversations and conduct toward people in every way possible. At that time, along in 1915, or in the early part of that year, there was nothing whatever indicative of any fear or apprehension on her part that her end was near or that she should prepare for it. She often remarked that if it was not for this knee, life held as much for her as it ever did. That was the only thing I ever heard her say about it.

Cross-Examination.

By Mr. Littleton:

I thought Mrs. Dickel was a lady of exceptional intelligence. I don't know that she discussed the future with any more pleasure or thought than anything else. Just anything that happened to come up, she was ready to enter into conversation and converse, but I don't recall that she was specially interested in one thing more than another. She was never despondent that I ever saw. On the other hand, I thought she was cheerful, of a cheerful, sunny nature, and seemed to be looking to the pleasure of others a great deal. People, when they reach the age of seventy or over, as I said Mrs. Dickel had—their life is pretty apt to be on the decline. There is nothing certain in any expectation after they reach that age, as much so as would be if they were younger. It is natural to suppose that every year a man puts behind him, he is that much nearer the end. Mrs. Dickel did not ever discuss in any way that left any special impression on me her business affairs, or ever make any remark to me about them. I recall having made some passing remarks, but she did not leave a sufficient impression on me that I can quote. Her mind seemed to be very active on the affairs of her estate. As to whether Mrs. Dickel personally looked after or supervised or handled all her different properties and whether she had a bank account of her own and matters of that kind, I know nothing more than through the casual remark she made one day that Mannie—she called Mr. Shwab that—that he had always invested her money

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for her very judiciously, and she used to pay me by check, so I presume she had a bank account. That is about the only thing I recall about her handling her own affairs. She always appeared to be very solicitous about Mr. Shwab's wife, and the relation, I thought, was very affectionate.

I have not heard her discuss all of Mr. Shwab's children, but it seems to me she was very fond of all the children that any reference was made to at any time. The impression I had of Mrs. Dickel was that she was a level-headed, practicable, sensible woman in the affairs of life. She never discussed with me in any way the matter of her estate after she died, or anything like that, to a degree that made any impression on me. Of course she would speak in conversation, in a casual way, about this or that matter, but just naturally in conversation. She never attempted to discuss her business affairs with me in any way, in detail. She never said anything to me that indicated she realized she was growing old and had almost lived her time out. I don't recall that she ever said anything in that regard that left any impression on me, not so that I would remember it. The thing that always impressed me more about Mrs. Dickel than anything else was that she would laugh about the idea of having a doctor. She said if her knee was all right and she could get more exercise, she would not need anything. Most old people like to talk that way, and some of the younger ones.

I do not know what was the cause of her death finally. It seems to me it was reported to be some sort of a stroke. I don't know. That is my impression as I now recall. As to whether she ever talked with me with reference to changing her residence to Michigan as a permanent residence before she left here to move to that state, I have some recollection, but it is vague in my memory because it was talking about going back and forth. As to whether she ever discussed going up there for any purpose, whether on a visit or for any other purpose, I cannot recall any more than casual conversations as the rest of the family would talk, but I don't recall that she ever emphasized or spoke of any decided residence permanently anywhere. I don't remember that she ever said anything to me with reference to any part of her property in connection with any of her visits to that state, or any disposition that she had made of her property.

You would naturally be impressed that she was a little

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above the average for her years. Just in going over her in a general way, that is, her appetite was good, had a good digestion, slept well and never complained of fatigue and all of her mental faculties were alert, and on physical examination there was nothing that would create any other impression.

Q. From your knowledge of people in general, of that age or of other ages, did she appear to be a lady that had an insight into the future, I mean from her general mental condition and her attitude.

A. A sight in the future? I don't know just what you mean by that.

Q. Did she appear to be a lady who had in mind the future in any way, I mean in a business way, or for any other purpose, was she alert on matters of that kind? A. I don't know that she discussed that more than any one thing. The thing that impressed you more than anything else was that she was ready to talk of anything you wished to discuss.

She spoke of going to Europe and going to Michigan and where she had been in Europe and things she enjoyed here or there. Of course there were some things she was not as well informed on as others, but I got impressed with her not going off at a tangent or having any hobbies of any sort. She was rather inclined to enjoy travel and had felt some disappointment at not being able to make her trip to Europe, as had been planned. She referred to that several times; otherwise I don't recall anything.

I examined her knee that she complained of, and did what I do with practically everybody past forty years that consults me for anything; I examined her, took the blood pressure and examined the urine, and I advise every one to do that, past that age, twice a year. I don't recall whether, at the time I made that examination, I had any conversation with her about her general condition, or whether it was likely to develop into any ailment in the future; certainly nothing that left any impression on me at the time of the conversation.

Redirect Examination.

By Mr. Vertrees:

When I spoke of Mrs. Dickel's mind being active in the affairs of her estate, perhaps that was answering Mr. Littleton's question without giving it due thought. I might say, by way of explanation, that some passing remark in the course of conversation showed me she was alert. She had spoken of stocks and bonds in a casual

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conversation that led me to believe she was alert as to the usual business transactions that any person would be interested in that had money. I understood her to be a woman of wealth, just from what I had heard of her. I presumed she was a woman who had considerable money. She never discussed with me any details of her estate, any investments or what she had done. About the only thing ever said was that Mr. Shwab had invested her money very wisely or judiciously or something to that effect; that she thought he had made better investments for her than he had for himself. That was the only thing that made any impression on my mind especially.

At this point, Mr. Walker objected to the following questions and answers as being incompetent, purely speculative and argumentative. The court sustained the objection and Mr. Armberg took an exception to the ruling out of each of said questions and answers. The questions and answers so ruled out are as follows:

“Q. I want to ask you a question that is somewhat hypothetical, with reference to old persons in general, and not Mrs. Dickel in particular. Is or is not this true: That very old persons, or very old persons, if they are in reasonably good health, as the years go on, they really have less immediate apprehension or danger of a near death, or departure than young persons do, if anything. The idea is this, to illustrate: A woman that has lived to be seventy years or eighty years, isn't it a peculiarity of those old people—

A. Yes, they think they are going to live right on.

Q. They are not in fear of immediate or near death, at all?

A. Yes, they take one extreme or the other, become very pessimistic and think they are going to die, or get on the other side and if everything is going well and nothing wrong, they see no reason why they should not live on indefinitely.

Q. Now, assuming that the particular individual I have in mind I have asked you about, has reasonably good health and has no disease that is liable to carry them off, isn't it true they are liable to take the optimistic view of it?

A. Yes.

Q. And isn't that very generally the case?

A. Yes, we see some people that develop a case of a sort of neurasthenia, so that they are apprehensive of everything. And on the other side they feel everything

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is well. Now those are questions you could discuss, of course, almost indefinitely."

The remainder of the deposition permitted to be read in evidence by the court was as follows:

As a matter of disposition, Mrs. Dickel was cheerful and hopeful, but not to the degree of being boastful that we see in some elderly people. In other words, it seemed to me she viewed the thing from the most sensible standpoint, a thing that nearly everybody that would come in contact with her would naturally comment on about her; not only myself, but many other people, that she was not a woman that went off at tangents, like many other elderly women often do.

The deposition of

Lon S. Hager,

witness in behalf of plaintiff, which deposition was taken at Nashville, Tennessee, on February 25, 1919, was read in evidence by Mr. Amberg.

Direct Examination.

By Mr. Vertrees:

I will be thirty-nine the first of March. I live at No. 139 Wharf avenue, Nashville, Tennessee. I reside about nine hundred and fifty or one thousand miles from Detroit, Michigan; something like that. I have lived in Nashville all my life. I must live about that far from Grand Rapids, Michigan. It is a good deal more than one hundred miles, anyway. My business is driving Mr. Shwab's car for him. I have driven Mr. Shwab's car for him nearly thirteen years, all the time. I have been away but three days in five years. It is a fact that he and his family have spent a good many summers in Michigan, at Charlevoix. I went up there with them all but two summers. I think they went there for eight years. I drive the car up there and Mr. Shwab and I fish and go to picture shows and things like that. I drive the car and take care of it and have done that during these years.

I knew Mrs. Dickel, of course. She is dead. I think she died the 16th of September, 1916, at Charlevoix, Michigan. I was up there then. This summer I lived in Mr. Shwab's house. Some summers I had a cottage up there. I am speaking of Charlevoix. At Nashville I had my own home, but I drive the car and spend my days with the Shwab family. I knew Mrs. Shwab, of course. Her condition has been very bad. You know she had a stroke of paralysis. I think it must have been about

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1914 she had the stroke. I am not sure about that, though. Coming now, especially to the year 1915, I remember the fact that the wills of Mrs. Dickel and Mrs. Shwab and Mr. Shwab were executed. It was some time in May, 1915, I witnessed those wills. They were executed at Mr. Shwab's residence, in Mrs. Shwab's room, at the same time; all right there together.

"Q. Do you know or did you hear it discussed, why those three wills were executed at that time?

A. Mrs. Shwab was in a very bad condition and they were trying to get away, and I understood they all made them together so they would not excite Mrs. Shwab."

"Mr. Walker: I think the answer should be stricken out, what he understood, as incompetent.

Mr. Amberg: He understood the discussion at the time, Your Honor; a part of the res gestae.

Mr. Walker: I move it be stricken out as incompetent.

The Court: Unless there is something further there that explains it, I will have to sustain the objection. The answer is too general and indefinite.

Mr. Amberg: Shall I read the other questions and answers before your ruling?

The Court: You have them before you.

Mr. Amberg: There are two or three more questions that continue to ask him what his understanding and idea was. The previous question was whether he heard it discussed and then his answer is as read, that he understood as I read.

The Court: I think I will sustain the objection.

Mr. Amberg: I take an exception.

The Court: The question was not specific enough in the first instance and the answer is more general than the question."

Upon like objection from Mr. Walker, the court refused to permit the reading in evidence of the following questions and answers in this deposition:

Mr. Amberg took an exception to the ruling out of each of said questions and answers. The questions and answers so ruled out are the following:

"Q. Do I understand you have this idea, that it was thought Mrs. Shwab ought to make a will, but if she was called on alone to do so, it would excite her?

A. Yes, sir.

Q. But if the others made theirs at the same time, it would be just a general business proposition?

A. Yes, sir.

Lon S. Hager.

Q. How long was that before they were to go away?

A. It wasn't very long before we went. We went about the first of June.

Q. So you say that it was a short time before that?

A. Yes, sir.

Q. Prior to your going?

A. Yes, sir."

The deposition was then continued to be read as follows:

I drove Mrs. Dickel out all the time when anybody went out, or Mrs. Shwab; she was always there. It was pretty natural, if the weather was good, to drive out nearly every day. We hardly ever missed a day, so I saw a great deal of Mrs. Dickel. I drove her out a few times alone.

I would say Mrs. Dickel was about the brightest old lady I ever knew. Her disposition was good. She did not quarrel with me. I have been out there all this time, and I don't think—I know that I have never had a cross word from Mrs. Dickel or Mrs. Shwab in all that time. That looks like it is not true, but it is the truth. She never talked to me any about her property and her affairs. She did not discuss that to amount to anything. She always left that to Mr. Shwab. She would say that she always left that to Mr. Shwab, and he seemed to always handle her business. She called him "Mannie." She would say "Mannie knows business," or something like that. I don't recall her ever saying anything to me about having made this deed of trust we are talking about here. I don't recall that she did. You know, she was so bright I don't think she would talk about that. She was always cheerful and she always had something to say and talk about.

"Q. Along at that time now, in April and May, 1915, particularly, I am asking about that time, was there anything that you recall, in Mrs. Dickel's conversation or conduct, to indicate that she, at that time, was in any apprehension at all of any impending death or death being near.

Mr. Walker: I think that that is probably covered by the court's ruling, only the other ruling was on the physician's testimony. Whether there is any difference as to this man, who was the chauffeur, or not, I don't know. I think I will make the objection to get the ruling.

The Court: I will permit the answer.

Mr. Walker: Note an exception.

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The Court: It is a little far fetched to ask a chauffeur a question of that kind.

Mr. Keeney: The opportunities for observation were good, Your Honor.

"A. No, sir; I never noticed anything or thought of anything of the kind.

I never heard her say anything and never saw anything to indicate that she was that way. She did not have that kind of a disposition. I have heard her say that she had made visits to Europe, and she was talking of wanting to go over again as soon as Mrs. Shwab got in condition for her to get away.

I went up with them in the car when they went to Charlevoix, Michigan, every trip, except one. I drove the car up there once, from Nashville to Charlevoix. I didn't do that more than once—one time. I always went in the car with Mr. Shwab; went up there together when he went.

Mrs. Shwab's health, at the time these wills were made, was very bad.

"Q. Were they, or not, apprehensive about her death?"

Mr. Walker: I think that is covered by the ruling that has been made.

The Court: Yes, I think so; I will sustain the objection to that.

Mr. Amberg: I take an exception.

(The answer to the question struck out by the above ruling of the court was as follows:

"A. It was something they could not tell anything about, her condition.")

I don't know what the advice was that Dr. Oughterson had given Mr. Shwab on that point. The state of feeling between Mrs. Dickel and Mrs. Shwab was just as good as it could be. She did not have any other relatives other than Mrs. Shwab and Mrs. Shwab's children; no near relatives that I knew of. The state of feeling between Mrs. Dickel and Mrs. Shwab was as good as it could be. It seemed like she liked all of Mrs. Shwab's children. Mrs. Dickel never had any children that I know of. It was my understanding that she never had any. I don't know how long she had been a widow, but it has been a long time—beyond my recollection.

Dr. Oughterson was the physician who attended Mrs. Shwab during that time. I don't think there was any other physician at that time. Dr. Oughterson attends her now.

Joshua H. Ambros.

I remember the fact that Mrs. Dickel fell and broke her wrist or arm or something. That was in 1916. It was some time in May. I don't know the date of the month. They went to Charlevoix at that time, that summer. Her arm seemed to be getting along nicely possibly ten days or two weeks, or something like that, after it happened. She seemed to get along all right after it happened.

I remember when she was taken in her last illness. I would say that was about two weeks before her death; I couldn't be positive, but I think it was something like that. That was in 1916. I believe you have asked me everything I know about this matter that would be of benefit to either side.

Cross-Examination.

By Mr. Littleton:

In a way I talked to Mrs. Dickel very much, you know, in the car, or maybe about little things around the house and what she wanted me to do. I never talked to her about her business affairs. I did not specially know what her mind was with reference to the affairs of her estate or her interests. That was something, as far as going into her business affairs, I didn't know. She appeared, from what conversations I had with her and what I saw of her, to be active in the interests of her business. I mean her interests. It was not necessary for her to be assisted at any time to get in and out of the car, but I always did it. I always helped Mrs. Shwab and Mrs. Dickel in and out of the car when they were getting in or getting out, or up the steps or anything like that. I don't know anything about the business affairs of Mrs. Dickel in Michigan. I understand that she changed her residence up there a short time before her death. I never said anything to her, or she never said anything to me about that, or any matters connected with that affair up there.

The deposition of

Joshua H. Ambrose,

a witness in behalf of the plaintiff, which deposition was taken at Nashville, Tennessee, on February 25, 1919, was read in evidence by Mr. Amberg.

Direct Examination.

By Mr. Vertrees:

I live at No. 122 South Twelfth Street, Nashville, Tennessee, and I am sixty-nine years old. I live more than one hundred miles from Grand Rapids Michigan. I have

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lived in Nashville forty-four years. I have been acquainted with Mr. V. E. Shwab, the plaintiff in this case, about thirty years. I am acquainted with his wife. I have known her about the same time. I knew Mrs. Augusta Dickel, Mr. Shwab's wife's sister. I knew her about thirty years, the same time. The position I hold here in Nashville in a business way is that I have been Secretary and Treasurer of the Nashville, Chattanooga & St. Louis Railway for thirty-two years, and since the Government took hold, Federal Treasurer for the Administration. Mr. V. E. Shwab is a director of the Nashville, Chattanooga & St. Louis Railway. He has been a director about four years, I think. Mr. Shwab and I have been very intimate and close friends ever since I have known him. I have been in his family as a visitor frequently, and visited every place where he has lived, very frequently, so I saw both Mrs. Dickel and Mrs. Shwab quite a number of times. It is a fact that Mrs. Dickel was a widow and had been for many years. I knew her husband before his death. I visited in their house. I knew of the fact that Mr. Shwab and his family, for some years, were in the habit of spending the summers at Charlevoix, Michigan. I went with them to Michigan in 1915. I was a guest at their cottage for a few days at that time. Mr. Shwab, as a director of the railroad, secured the use of the car, and I, as an officer of the railroad, went along to see that the transportation was handled properly. This was a special car he took his family in to Michigan. He got that car at that time because his wife was quite ill. He had not done so before. He has since, and taken her up there. On this occasion there were in the party in this car, Mr. Shwab, Mrs. Shwab, Mrs. Dickel and Mrs. Shwab's daughter, Bessie, and I think Mrs. Ambrose. Mrs. Ambrose went up there with me on two occasions. I have been there more than once. There were one or two nurses accompanying Mrs. Shwab. I am not sure as to the number; I know there was one.

No nurse, to my knowledge, accompanied Mrs. Dickel on that occasion. She was apparently in very good health. I saw her and conversed with her on the car on the way up, and saw her after I got there. That was in 1915. It was the latter part of May or early in June. Mrs. Dickel's physical condition at that time apparently was very good. Mentally, her condition was just as good as it ever was. I saw no difference between that time and any other time. There was nothing that came to my notice

Joshua H. Ambros.

in Mrs. Dickel's conversation or conduct to indicate she was at all apprehensive that her end was near. On the matter of cheerfulness, apparently she was in very good spirits.

The circumstances after I got there that enable me to testify as to her condition are as follows:

Mrs. Dickel and I walked from the station up to the house, to the little cottage, and in going up there I saw a number of varieties of flowers and plants that do not grow in this latitude and that were strange to me, and knowing that Mrs. Dickel, years before, had paid a great deal of attention to flowers, I asked her if she knew the names, and she gave me the names of quite a number of them and seemed to be perfectly familiar with the flowers and plants and talked very intelligently about them. We were not walking up from the station to the hotel, but to the cottage, although the path does go past the hotel, on the way to the cottage. There was nothing in her conversation, either on that trip, or at any other time, that indicated that she was apprehensive or despondent or fearful of death in any way.

She died, I think, in 1916. I was up there that summer. I was not there at the time of her death. I left before that. She died at Charlevoix, Michigan, at her cottage, as I understand. I know something of her business relations with Mr. Schwab. He looked after all of it for her. She paid practically no attention to it so far as I know. I understood she owned a half interest in the firm of George A. Dickel & Co. She did not give it the slightest attention that I know of. I never heard of her doing so. I was at the store of George A. Dickel & Co. a great deal; almost daily for several years.

"Q. Did you ever hear her express herself as to Mr. Schwab and the management of her business affairs?"

"A. I never heard her speak about business at all."

I was informed that she did receive an injury in the fall of 1916, breaking her arm, or something. At the time I made this trip to Charlevoix, in 1915, and while I was there she was apparently in as good health as she had been for eight or ten years previous. The general state of her health was very good. I staid at Charlevoix, at that time, about three days, and then I went back again afterwards. Her condition when I went back later was about the same. I did not remain until they came back in the fall, though I went and came back with them. I think they returned to Nashville late in September.

She lived, when her husband, Mr. Dickel, died, on the

Joshua H. Ambros.

Dickerson Road, near Nashville. Mr. Shwab, at that time, lived next door. In other words, they lived out there in adjoining houses. I do not know how long, as a matter of fact, after her husband's death, she lived in her own house. She lived there a while and then moved over to Mr. Shwab's house. She has been with the family ever since. She never had any children that I know of. I never heard of any relatives or close relatives that she had at all, other than Mrs. Shwab.

I don't know of anything else that would be of interest or benefit to either party that I have not stated.

Cross-Examination.

By Mr. Littleton:

I saw Mrs. Dickel between June, 1915, when I went to Charlevoix, Michigan, with them, about ten times until the time of her death. I saw her at Charlevoix; after she came back and before she went back the last time, in 1916, when I went there and they all came back with me, and then every once in a while I was at Mr. Shwab's house and would see Mrs. Dickel. She never discussed with me any matters with reference to her interests which she held. She never said anything to me about the trust agreement with the Detroit Trust Company that is in question in this law suit. Mrs. Dickel did not appear to have in mind the different interests held by her most of the time. She never, apparently, paid any attention to business, in so far as any of her conversation with me indicated. Her mind was also quite alert and keen on all subjects.

"Q. Did she appear to be a woman with an active insight into the future about the affairs and what she was to do and what she expected to do, or did she just take each day as it came, and apparently have no thought in the future.

"A. She was a woman, I should say, of a little more than ordinary intelligence, and took an interest in affairs as they came along in a natural way and about the same manner that any other woman in her condition would."

So far as I am aware, she was not neglectful of any of her interests in any way. I did not say that in my conversations with her she stated that Mr. Shwab usually looked after her interests. I think I said that was my understanding and my general knowledge, from my association with them, that he did look after her business and she paid little or no attention to it. She lived with Mr. Shwab from soon after her husband's death up to the time of her death, for quite a number of years.

Victor Emanuel Shwab.
Redirect Examination.

By Mr. Vertrees.

The relations between me and Mrs. Dickel were friendly.

Recross Examination.

By Mr. Littleton:

Mrs. Dickel and Mr. Shwab's children and Mr Shwab's wife were all on excellent terms in so far as I could see. Mr. Dickel seemed to think a very great deal of Mr. Shwab's wife and also of all his children. The general impression I got was that she seemed to have their interests at heart as well as her own, and their welfare.

The deposition of

Victor Emanuel Shwab,
a witness in behalf of plaintiff, which deposition was taken at Nashville, Tennessee, on February 26, 1919, was read in evidence by Mr. Keeney.

Direct Examination.

By Mr. Vertrees.

My age is seventy-two years. My home is in Davidson County, Tennessee, and I am at present residing in Nashville, Davidson County, Tennessee. I have been a resident of Davidson County, Tennessee, practically all my life. I have been engaged in business on my own account since 1871. I was with the firm in 1866, but became a member in 1871. The firm was doing business at Nashville, Tennessee. The firm, at the time I first became a member, was composed of Mr. George A. Dickel and a man by the name of Salzkotter and myself. That firm did not continue long; I cannot remember the exact time; probably five or six years. This man retired from the firm, leaving George A. Dickel and myself. The name of the firm was always George A. Dickel & Co. The firm of George A. Dickel & Co. continued under that name, with me and Mr. Dickel as the partners and members of it up to the time of his death, which was in 1894. The firm of George A. Dickel & Co. continued after his death. Mrs. Dickel and I continued the firm just the same. My son George was subsequently admitted, with a working interest. The firm continued with that membership—Mrs. George A. Dickel, myself, V. E. Shwab, and my son, George A. Shwab, until her death. Mrs. Augusta Dickel died in September, 1916. The firm of George A. Dickel & Co. is still in existence. You are to understand from my statements, in all these changes the firm continued in business, retaining the old name. On

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the death of Mr. George A. Dickel, his wife, Mrs. Augusta Dickel, became a member of the firm and continued his interest. Mr. Dickel—I don't know that he stated it in his will, but requested that if she wanted to continue the interest to let her do so, and I did it.

Mrs. Augusta Dickel was a sister to my wife. Mrs. Dickel never had any children.

Mrs. Dickel had no near relatives other than my wife and my wife's children, or none I know of in this country, at all. She had some distant relatives, who were cousins. They were scattered; some in this country and some, perhaps, in Europe. I never met any of them. During all these years I have spoken of, that is, from 1894, the death of Mr. Dickel until 1916, at the time of the death of Mrs. Dickel, she was a member of the firm. She did not give the business any attention; I cannot say she gave it any attention. She might ask me a question about it occasionally. She did not give the business, the conducting of it, or having anything to do with the management of it, any attention at all. I gave it attention exclusively. During all these times and during this period that she was a member of the firm since Mr. Dickel's death, Mrs. Dickel lived either adjoining or with me. We lived together; practically together. By "living adjoining," I mean that for one year or two after Mr. Dickel's death we lived in the country and she had the adjoining house. Then she came over and lived with me and gave up her house. The relationship or state of feeling between my wife and Mrs. Dickel was very devoted. She looked upon my wife more as a daughter than as a sister, because she was much younger. Mrs. Dickel was very devoted to all of my children. As a matter of fact, she made some allowances to some of them out of her money, and paid them money, three of them. She gave a regular allowance to one of my sons, Felix, of \$250 or \$200 a month, and the same to my daughter, Bessie, and she gave Buist, also, from time to time, no regular allowance, but whenever he needed anything she gave it to him. I have seven children. Three are girls. I failed to tell you that in addition to this she gave them substantial sums, round sums of money, as gifts; quite a lot. She had an income from her business and from the bonds and stocks and real property in which her profits were invested and some inheritance; she had some income from that too. She drew a check on the bank for this money which I say she spent for herself and gave away in the manner I have indicated. She

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kept a bank account in her own name. Whenever she needed money, I would deposit it to her credit from the firm account, and had instructed the bank to honor her checks in case her account was not good at the time. She kept her account in the First National Bank until a few years ago, and then in the Fourth and First National Bank. The Fourth consolidated with the First. I kept the firm account and my individual account in the same bank. The instructions, both to the store and to the bank, were to keep that account good, or, in other words, to honor all of Mrs. Dickel's checks. That was the course of business.

I never made any written statements at any time to Mrs. Dickel of her property or estate. I talked it over with her occasionally. She was not consulted about any business venture, or whether I made an investment or did this or that. She did not want to be consulted. She said go on and do as I pleased.

Mrs. Dickel's age, at the time of her death, was 78 or 79 years. She was born in 1838. She inherited some money that came to her from Germany, from her father's people. Her maiden name was Banzer. She married here in Nashville. I was married here in Nashville. My wife, Mrs. Emma Shwab, has been in poor health for many years. She has been in bad health for a good many years; I cannot say just when, but she had the stroke of paralysis, which was the worst sickness she had, that was in May, 1914. We called in a professional nurse to look after her when she was first taken ill in May, 1914. Miss Lewis was with her then. She was the first. For some years my family and I have been in the habit of going to Charlevoix, Michigan. The first season or year that I went there was either 1910 or 1911. I have gone continuously every summer since. We usually left here the latter part of May or the first of June, and staid there as late as September, when we could get a through train; until October frequently. My wife and myself and Mrs. Dickel would go there through these years I have been going there, and during the summer the children, some of them, would go with us there. All of my daughters are married now. Two of them were not married in 1911. The oldest one married Otto H. Lindenberg, of Columbus, Ohio. That was Louise. The next one married Paul M. Davis, the second child. He lives in Nashville, Tennessee. The youngest married Ben E. Tate, of Ashland, Kentucky. All of my sons are married now. At that time they all lived here. It is true that at some

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period of the year always one of these children would be in my household at Charlevoix, Michigan. Since my wife's severe illness, particularly, made it a rule for one of the girls to be with us. The others would be there in cottages of their own. They all came there for the summer.

The matter of making this deed of trust which was subsequently made to the Detroit Trust Company in 1915 first presented itself to me and was first undertaken or considered by me in 1913. Perhaps in 1914. The matter of taxation was one of the reasons why I first came to consider such a thing, was what first put the thought in my mind. I believe you suggested it to me, Mr. Vertrees. I know I consulted you about it.

"Q. At any rate, acting on your own idea, did you undertake to make any inquiry about that matter?"

"A. That is where I am mixed up. I got you to write some letters for me and I wrote to other people myself. I had several letters written.

You, Mr. John J. Vertrees, were the legal adviser at Nashville, Tennessee, of George A. Dickel & Co. and myself also. Mr. John J. Vertrees has been our attorney and legal adviser since 1900, my impression is. You say about 1902 or 1903, but I think it was in 1900. It has been a good many years anyway.

"Q. Did you have Mr. Vertrees, after you got this thought in your mind, write any lawyers in Michigan, with reference to the matter, and if you say you did, I wish you would file as an exhibit to your deposition a copy of the letter which you had him write.

"A. You mean in reference to the laws of the state? We wrote to different firms."

(The witness was shown a paper.)

That is a copy of a letter written by John J. Vertrees of date Jan. 26, 1914, to Messrs. Travis, Merrick & Warner, Attorneys-at-law, Grand Rapids, Michigan.

The above letter was introduced in evidence and marked Exhibit "G" and read by Mr. Keeney.

Mr. Vertrees received a reply and I am able to produce that reply. (Paper produced.)

This is said letter addressed to John J. Vertrees, Nashville, Tennessee, of date Feb. 11, 1914, signed by Travis, Merrick & Warner.

Said letter was introduced in evidence and marked Exhibit "H" and read by Mr. Keeney.

"Q. The letter of Mr. Vertrees, which has been filed as Exhibit "G" says, "We have been referred to you by

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Mrs. C. H. Hollister of the Old National Bank." Had you written him first?

"A. I first wrote to a friend of mine at Grand Rapids, asking for the name of some good attorney."

I wrote to him for a reference, and then this letter of mine I gave it to Mr. Vertrees. When Mr. Vertrees' letter says, "I have a client who has spent several summers in Michigan and thinks seriously of making that state her home at an early date. She is a woman of means and desires to know something of your tax laws before changing her residence," the woman referred to there is Mrs. Augusta Dickel. Mr. Howard J. Leshner, of Detroit, is an official, I think Vice-President or some official of the Detroit Trust Company. I wrote a letter to him, making inquiry as to the laws of Michigan with reference to taxes, and (producing paper) exhibit a copy of a letter I wrote him, of date March 10, 1914.

The letter referred to was the same as that marked Exhibit "A" and introduced in evidence on the examination of Charles P. Spicer.

I received a reply to that letter, signed "Detroit Trust Company by Charles P. Spicer, Vice-President," dated March 13, 1914, which says in the body of the letter that it is a reply to my letter of March 10th, addressed to Mr. Howard J. Leshner, and I file the same as an exhibit.

The letter above referred to had previously been introduced in evidence and marked Exhibit "B" on the examination of Charles P. Spicer.

I caused Mr. Paul M. Davis, my son-in-law, to make an inquiry into these matters for me. I had him make several inquiries, but this is perhaps the only letter we have, tending to show that fact. We inquired of a Trust Company in New Jersey and Delaware and New York. We haven't those letters though, I don't think. That was, perhaps, prior to the time this trust was made; in fact I know it was. This letter which I now produce as an exhibit is from the Fidelity & Columbia Trust Company, of Louisville, dated March 12, 1914.

The above mentioned letter, of date March 12, 1914, from L. W. Botts, Vice-President of Fidelity & Columbia Trust Company, addressed to Mr. Paul M. Davis, Nashville, Tennessee, was introduced in evidence and marked Exhibit "I" and read by Mr. Keeney.

In addition to writing Mr. Botts, I had a consultation with him about the same time, I had my son-in-law, Mr. Otto H. Lindenberg, make inquiry of some one with reference to this matter, and I produce this letter which he

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had in response to his inquiries. This letter was written July 9, 1914, addressed to Mr. Otto H. Lindenberg, Charlevoix, Michigan, and is signed by C. H. Stearns.

The above letter was introduced in evidence and marked Exhibit "J."

That cottage, 204 Belvedere, was the cottage I was occupying, but he was with me. Mr. Lindenberg does not live at Charlevoix, Michigan; he lives at Columbus, Ohio. He is connected with the M. C. Lilly Manufacturing Company, and they have a branch at Kalamazoo, Michigan, The Henderson-Aimes Company, and this man is attorney for that company there. We were discussing this matter along or at the time, in the cottage, and I was getting the information. It was at my request that Mr. Lindenberg wrote him.

I made inquiry of a lawyer at Charlevoix, Michigan, with reference to the matter about the same time. That was Mr. Lisle Shannahan, who was the City Attorney at Charlevoix. Mr. Shannahan made inquiry of the State Officials, with reference to the matter, for me. I put the question to him, the same question I had to the other attorneys, and he wrote two of the state officials and I see he refers to them here. I was at Charlevoix when this was done. Mr. Shannahan gave me copies, or the letters themselves, he had received from the Auditor General of the State and the Attorney General. I expect he gave me their original letters. Possibly he gave me only copies. I see he does say in here "copies of which are attached for your benefit."

I will file as an exhibit a letter written upon paper having a letter-head "Lisle Shannahan, Attorney-at-law, Charlevoix, Michigan," dated July 27th, 1914, addressed to Mr. Shwab, Belvedere Resort, Charlevoix, Michigan, but unsigned.

The letter above referred to was introduced in evidence and marked Exhibit "K," and read by Mr. Keeney.

I also file as an exhibit another letter, purporting to be a copy of a letter of date July 20, 1914, from O. B. Fuller, Auditor General of the State of Michigan, by George L. Hauser, Deputy, addressed to Mr. Lisle Shannahan, Charlevoix, Michigan.

The letter above referred to was introduced in evidence and marked Exhibit "L," and was read by Mr. Keeney.

I also file as an exhibit another letter, purporting to be a copy of a letter addressed to Mr. Lisle Shannahan, dated July 22, 1914, and signed Grant Fellows, Attorney General of the State of Michigan.

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The letter above referred to was introduced in evidence and marked Exhibit "M" and read by Mr. Keeney.

Mrs. Dickel and I, after making these inquiries, determined as to the advisability of making the deed of trust which we had in contemplation. I instructed one to be drawn up, and gave the instructions to my attorney, Mr. Vertrees. He drew up a deed of trust. My recollection is that that deed of trust covered about \$700,000 to \$750,000. One was drawn up to be executed by Mrs. Dickel to this company, the Detroit Trust Company. It was never executed. That was drawn up some time in 1914, but just exactly the date I can't remember.

"Q. Why was that not executed, do you recall?

"A. As I remember it, the trouble at that time was the very severe illness of my wife."

I later took up the matter again, as that one was not executed with the Detroit Trust Company, as to the execution of that deed of trust. I did that before I left here, early in 1915, before we left for the summer. We wrote a letter to the Detroit Trust Company, requesting them to come down or send a representative, which they did. I have a copy of that letter. I here file a copy of a letter written by me on April 15, 1915, to the Detroit Trust Company, Detroit, Michigan.

This letter is the same letter that was introduced in evidence as Exhibit "C" on the examination of Mr. Charles P. Spicer. It was not re-read at this time.

I received a reply to that letter to the Detroit Trust Company, dated April 17, 1915, addressed to me and signed Detroit Trust Company, by Charles P. Spicer, Vice-President, and I file it as an exhibit.

The letter above referred to was previously introduced in evidence as Exhibit "D," on the examination of Mr. Charles P. Spicer, and was not read again at this time.

Mr. Spicer, the Vice-President of the Detroit Trust Company, came down in response to this letter. We first, after consultation, submitted him a trust deed which we had drawn up.

Refreshing my memory, as a matter of fact, I transmitted to him with my letter a copy of the deed of trust, already drawn, that he might have it to consider before he came down. I had forgotten that. When Mr. Spicer came, he took the matter up with you, Mr. Vertrees, my attorney. As a result of the consultation between Mr. Spicer and Mr. Vertrees, a deed of trust was prepared, mutually acceptable to both parties. Up to that time, Mr. Spicer had not seen Mrs. Dickel, to my knowledge.

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Up to the time that the deed of trust was prepared, he had not seen Mrs. Dickel at all to my knowledge. After he consulted with us about it, he stated that he would like to go out and have a talk with her, alone, and see her condition, mentally and physically, which he did. When I say "went out," he went out to her home. I did not go with him. My counsel did not go with him. Some one drove him out there, but it was not me. No one was with him when he met Mrs. Dickel. After he met her, he returned to the office of my counsel.

"Q. What did he report as to his desire to proceed with the matter?

Mr. Walker: I object to that as incompetent, immaterial.

Mr. Keeney: I don't see why it is incompetent for Mr. Shwab to testify to that.

Mr. Walker. Mere hearsay.

Mr. Keeney: Because Mr. Spicer did, it is a part of the transaction.

The Court: It may have been a part of the transaction; at the same time it is upon a different basis altogether than the investigation made. I don't know as it is very material to any issue that has been raised in this case so far as that is concerned, because up to this time the validity of this trust has not been questioned as I know of. I will sustain the objection. I don't see that it is very important, however.

Mr. Keeney: Note an exception.

(The answer to the above question, ruled out by Judge Sessions, was as follows:

"A. He was very much pleased and said he was ready to go ahead with it.")

It was gone ahead with and finished. That is the deed of trust that is in controversy here. It was executed some time in April, 1915, I think. To be accurate, the date is April 21, 1915. The bonds were then or subsequently placed in charge of them. Preparatory to this and after it was determined by me and Mrs. Dickel that it should be done, Mrs. Dickel bought herself a home in Charlevoix. With reference to Mrs. Dickel acquiring citizenship in Michigan; she first obtained an option. That was in the latter part of 1913. She had bought, some time before that, a couple of vacant lots at Charlevoix, for the purpose of building. She had not erected anything on them. She hesitated about erecting on them. She took an option on this property that she afterwards bought. She finally determined to close that op-

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tion and buy the property. I am able to state when she exercised that option and closed it. It was February 16, 1914, she decided to exercise the option and purchase the property. The transaction was completed, conveyances were made to her and she paid the purchase price shortly after that, so that was her home at the time of her death.

Mrs. Dickel died in Charlevoix, Michigan. She did not die in that cottage. While she owned this cottage, on account of my wife's condition, we had rented another cottage that was very private and very remote from everything. Her condition was so serious that we wanted her absolutely quiet and this cottage was cut off from everything, so we went there with my wife, and of course living in the house with my wife, she went with us, and one of the children occupied the other cottage.

Mrs. Dickel's condition, both mental and physical, in 1915, in May, when this deed was executed, and at any time previous thereto, say in January and February and March and April and May and June, was good. She was not afflicted with any incurable malady or disease that threatened to take her life. She was not at all apprehensive of impending death or peril of death of any kind, and she never expressed herself in that way and I never heard her intimate in any way that she had that feeling.

"Q. What was her disposition; was she despondent or hopeful?

"A. On the contrary, she was always cheerful and pleasant.

"Q. Did Mrs. Dickel or any of you have any idea or expectation that she was in danger of passing away in the near future?

Mr. Walker: I object to it as incompetent.

The Court: I will sustain that objection; too broad.

Mr. Keeney: Note an exception to this ruling and also to the ruling of the Court excluding the following questions and answers.

(The answer to the above question and the other questions and answers covered by the above objection and exception are as follows:

"A. No, sir. You mean back in 1915?

"Q. Yes.

"A. No; not at all.

"Q. At any time in 1915?

"A. No.)

Mrs. Dickel's health failed and became serious as to her condition and we became alarmed about her condition about ten days or not over two weeks before her

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death. She died about the middle of September, 1916; to be accurate, the 16th of September, 1916. I am executor of her will. No other person was named than I. She left a will. The date of the will is the date it was drawn, May 22, 1915. I probated that will at Charlevoix, Michigan. I will file a copy of that will.

I here file as an exhibit a certified copy of Mrs. Augusta Dickel's will, and attached thereto are also the letters testamentary issued to me, or a copy thereof.

Letters Testamentary of date Oct. 17, 1916, appointing V. E. Shwab executor of the last will and testament of Augusta Dickel, deceased, issued by Servetus A. Carrell, Judge of Probate of the Probate Court for the County of Charlevoix, Michigan, a copy of the last will and testament of Augusta Dickel, executed on the 26th day of May, A. D. 1915, and exemplification of record from the Probate Court for the County of Charlevoix, certifying said letters testamentary and said will to be correct transcripts of the originals, were introduced in evidence and marked Exhibit "N," and were read in part by Mr. Keeney.

I remember the circumstances under which that will was executed. At the time, my wife was very desperately ill and we had very little hope of her recovery and we considered it was best for her to make a will and we did not want to do it in a way which would alarm her, so one of us suggested that as we were going away for the summer, we would all make our wills before we left, for fear anything might happen. When I say "we all," I mean Mrs. Dickel, myself and my wife. So we three all executed our wills at the same time, at our home on West End Avenue, Nashville. They were executed in that way and at that time, for the purpose stated. We had never executed our wills together before. I don't think my wife had ever before made a will to my knowledge. Mrs. Dickel had. I think Mrs. Dickel had, some years before that; I know she had.

After I had qualified, the United States Government sent me forms, at some date, for me to report upon as to the estate of Mrs. Dickel. I made that report. I reported by letter to the Collector of Internal Revenue at Grand Rapids, Michigan, Mr. Doyle. I have a copy of the letter written to Mr. Doyle and I here file the same as an exhibit, the same being a copy of a letter of date November 10, 1916, written by me to Mr. E. J. Doyle, Collector of Internal Revenue, Grand Rapids, Michigan.

The original of the above letter was produced by Mr.

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Walker and introduced in evidence and marked Exhibit "Q."

Mr. Walker: I take it, then, that those are admissible for the purpose of showing the inception and termination of the negotiations or transactions between the executor and the collector or the collector's office or his superior, for the purpose of showing a proper foundation was laid for this claim, but I take it they are not admissible for the purpose of showing the truth of the statements therein contained in reference to Mrs. Dickel's health or the purposes or intentions. For the one I have no objection if so limited.

The Court: It will be admissible for that purpose in any event.

Mr. Walker: Yes. As to the other I think that they should either now or later be limited. I will object to their reception for any purpose except the first stated.

The Court: I suppose the only purpose of it is to show the foundation of this suit.

Mr. Keeney: That is the purpose, Your Honor.

The Court: Is there any question about that?

Mr. Walker: No, Your Honor.

The Court: And the suit having been properly planted?

Mr. Walker: No.

Mr. Keeney: Well, it shows a little more than that, Your Honor. It shows that the executor promptly made his return and paid the tax upon the estate left by Mrs. Dickel, and that he informed the collector relative to this conveyance and sent him a copy, but that he promptly set up the claim that there was no tax on that and the reason for that.

The Court: Is there any dispute of that statement? Is there any claim that the statement just made by counsel is not correct?

Mr. Walker: I have no knowledge upon the subject, I have never seen the letter.

The Court: My only thought was that we could save time.

Mr. Keeney: It is a very short letter, Your Honor.

Mr. Walker: I have no copy of the letter and I know nothing about it.

The Court: I didn't know but you were leading up to a long line of correspondence here.

Mr. Keeney: Oh, no, it is a letter about a page and a half in length.

Mr. Walker: I am inclined to think that it would still

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be incompetent as a self-serving declaration. I haven't seen the letter or read it through except as I glanced at it. I noticed counsel's statement yesterday in his opening upon the subject.

The Court: I think it is competent for the purpose of showing proper foundation for this suit.

Mr. Walker: I think so, too. I object to it for any other purpose.

The above letter, Exhibit "O," was here read by Mr. Keeney.

There was attached to said letter a copy of said trust deed of date April 21, 1915, heretofore introduced in evidence on the examination of Mr. Charles P. Spicer, as Exhibit "E."

Mr. Walker: Your Honor, to raise the exact question, I move to strike out the portion of the letter that makes the statement as to the purpose of the trust instrument and when it should take effect, the purpose of Mrs. Dickel as to when it should take effect, and also as to whether it was or was not made in contemplation of death, self-serving.

The Court: The application will be denied. However, that part of the letter cannot be regarded as substantive proof of its contents and will not be considered by the jury for that purpose.

As this letter states, I sent Mr. Doyle a copy of the deed of trust made by Mrs. Dickel to the Detroit Trust Company, along with this explanatory letter. I received a reply from Mr. Doyle, acknowledging receipt of that letter and that copy, and I here file it as an exhibit, a letter from Emanuel J. Doyle, Collector, of date November 16, 1916, addressed to Mr. V. E. Shwab, Nashville, Tennessee.

The above letter was introduced in evidence and marked Exhibit "P," and read by Mr. Keeney.

I reported the value of the estate to him; the value of the estate in my hands and under my control as executor. I paid Mr. Doyle, on Feb. 13, 1917, \$27,818.73, the taxes payable on the estate, valued as the amount at which I valued it. Subsequently, Mr. Doyle sent out someone for the Government to investigate the value of the estate. I think it was Mr. Myers, the gentleman now present here.

The result of his investigation was that the personalty was about correct, but as to the realty, some of it was undervalued. That was his conclusion. As a consequence, the valuation was increased so as to increase the

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tax claimed. The amount of the additional tax was \$2587.64, which I remitted and paid. The personalty was not increased. \$30,406.37 was the total tax that I paid as the amount which was regarded as the proper amount to be paid.

Collector Doyle made further claim on me for the property conveyed in this deed of trust by Mrs. Dickel. He demanded that I pay that. I did pay it. I paid it later under protest. The amount which I paid as the tax, under protest, and which I claim was unjust was paid December 14, 1917. It was \$56,546.41. I paid that as executor of the will of Mrs. Dickel, and I paid it to Mr. E. J. Doyle, Collector, as the tax demanded by him on this property conveyed in this deed of trust to the Detroit Trust Company. I paid it under protest. My protest was in writing. I have a copy of the letter written by me to Mr. Doyle when I paid the \$56,546.41 demanded by him and paid by me under protest, and I file it as an exhibit, it being a letter written by me as executor of the last will and testament of Augusta Dickel, deceased, December 14, 1917, to E. J. Doyle, United States Collector of Internal Revenue, Fourth Collection District of Michigan, Grand Rapids, Michigan.

The above letter was introduced in evidence and marked Exhibit "Q" and read by Mr. Keeney.

That money has never been repaid to me. In one of the letters I stated to Mr. Doyle that I would send him affidavits as to the facts, if he desired them. I did do that. I sent him affidavits of Dr. Oughterson, Dr. Armstrong, Miss Schell, Mr. Ambrose, my son, and, I think, yours, Mr. Vertrees. These affidavits were sent to Mr. Doyle before I paid this money under protest. He notified me, after examining them, what his action would be. He declined to allow it. When I paid under protest, I filed a statement in writing of the grounds of my protest and the reasons why I thought the tax was unjust, and should not be paid. I here file as an exhibit copy of an affidavit made by me, V. E. Shwab, and sworn to by me on the 19th day of December, 1917, before Paul M. Davis, Notary Public in and for Davidson County, Tennessee, which said affidavit constitutes a claim for refund made to the Commissioner of Internal Revenue.

The affidavit and claim above referred to was introduced in evidence and marked Exhibit "R" and read in part by Mr. Keeney.

After I had done that, I appealed to the Commissioner,

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and the Commissioner, after considering it, declined to relieve us. I had to pay it.

We then brought suit at Grand Rapids, Michigan; instructed our attorneys to bring suit there. That is the suit in which these depositions are being taken. I don't remember the date that my claim was rejected and my appeal denied when I appealed to the Commissioner of Internal Revenue, but I do remember that fact. I am able to state that I did appeal and that appeal was denied by the Commissioner. That was before I brought this suit. Then I sued in the District Court, at Grand Rapids, Michigan; that is the suit in which these depositions are being taken.

The principal object and purpose in making that deed of trust to the Detroit Trust Company was to avoid local taxation. Under the laws of Michigan there is a nominal tax on mortgage bonds, as the letters all show, of one-half of one per cent. if registered, and that exempts them from taxation. After investigation of the different states, I found that to be the best, so on the payment, the way I have stated it, of five dollars a thousand on the execution of this deed of trust, and the registration of these bonds, they were thenceforward not subject to state, county or municipal taxation. That was the reason this was worked up in the way it was and was finally done.

"Q. Was it made in contemplation of Mrs. Dickel's death at that time?

"A. Oh, no; no such thought."

None of us were at all apprehensive of that at that time. The state of her health at that time was good so far as any of us knew. This money that I paid under protest has never been refunded to me and is still due me. The value of Mrs. Dickel's estate, at the time she made that deed of trust, was about one million, seven or eight hundred thousand dollars.

Cross-Examination.

By Mr. Littleton:

Before the execution of this deed of trust by Mrs. Dickel, I talked it over with her. She told me nothing more than what the trust deed itself says, at the time, how she wanted the proceeds and interest, etc., of this last trust deed handled. That was her wish in the matter.

"Q. At the time she made this trust deed, did she have in mind or did she make any statements with ref-

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erence to the disposition of the proceeds from these stocks and bonds, after her death?

"A. No.

"Q. I say, with reference to the disposition she makes of the income, etc., was that made with a thought that she probably would not be living and intended for this to remain in force after she died?

"A. I don't exactly catch that. You mean, did she suggest anything like that?

"Q. Did she have anything like that in her mind?

"A. No."

You see she says the proceeds from this shall go after my death, not her death, to these other children. That is what the deed of trust states. She had that in mind, of course, and upon the death of any of the beneficiaries, the share of the net income that said beneficiary would have received, had she or he not died, shall be paid to the issue of such beneficiary. That is, the children of my children. I would hardly think that she expected, at that time, to live longer than my children, or I. She surely contemplated then, at that time, in case she died, this instrument remained in force.

"Q. That was what I was trying to get at.

"A. Yes.

"Q. And she desired, in making this deed of trust, that she be able to direct how the income and proceeds from these bonds be distributed in case she should die before the instrument was revoked?

"A. Yes.

"Q. I mean, change the trustee instead of revoking it.

"A. Yes. That deed of trust is irrevocable, I think. I know that is the way she wanted it. She had an ample estate left, you know. She had seven or eight hundred thousand dollars left, and her interest in the business, which was very prosperous at that time.

"Q. At the time this instrument was executed by Mrs. Augusta Dickel, I believe you say she was about seventy-six or seventy-seven years old. That was about a year before her death. It was executed in the spring of 1915, and she died in the fall of 1916.

"A. About a year and a half, or nearly two years before her death. It was executed in the Spring of 1915 and she died in the fall of 1916."

Mrs. Dickel, during the different conversations I had with her with reference to this instrument, before it was finally executed—I never talked to her, nor did she ever make any statement as to how long she would probably

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live after this instrument was executed. She never mentioned that subject. She did not make any statement to me as to her desires in case she should die, as to carrying this instrument out. She never made any statement with reference to her death. She expected to go abroad the following year. I said in my direct examination that I handled practically all of the affairs of Mrs. Dickel after her husband's death. After she came to my home to live, she lived there as one of the family. It was her home, really, that I lived in the last few years. The house was hers; she owned the property. In all her life I never knew her one time to consult with me about her affairs; that is, her income and her property. I would sometimes suggest some things to her. She did not keep up with financial matters so far as the property she owned herself was concerned. I would never discuss with her any investments I desired to make for her. I might talk to her about it after it was done, but rarely ever consulted her about it before. I don't think I ever did it. In fact I know I did not. Mrs. Dickel was away from home a good deal. She traveled for years, and in the summer time took trips. I don't mean she was traveling all the time, but she would take trips to New York and to Chicago. I said this deed of trust was different from the first instrument drawn up, which was not executed. That first instrument, that was not executed, this one being afterwards substituted for it—the first one reserved to Mrs. Dickel the income from this property for her lifetime and after her death, as provided in here, with probably a few changes.

At that time it was necessary, under the laws of Michigan, that is, under the tax laws of Michigan, that she be a resident of that state, in order to take advantage of this instrument.

The deed was executed April 21st, and her will was executed May 22, 1915. Mrs. Dickel did not make any mention of these securities in her will.

“Q. Was it her intention at the time she made this instrument that it should act as a disposition of her property after her death?

“A. The trust deed?

“Q. Yes.

“A. That was to take effect at once.

“Q. But to operate even after she had died?

“A. Oh, yes.”

I said the principal object of this deed of trust was to avoid heavy taxation, annual taxation here, on ac-

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count of the smaller tax in Michigan. The cost of keeping these securities in the state of Michigan, that is, the tax and the compensation of the Trust Company, is as follows: The tax I have stated, that was five dollars per thousand, but that is not annually; that is only one time, for all time, and I think the Trust Company charges four per cent. of the income for handling the trust. I could not tell you what was the total tax Mrs. Dickel and I paid on these securities in Tennessee before this instrument was executed. I guess it is true that for several years prior to the execution of this instrument, Mrs. Dickel did not pay any taxes at all on these bonds and that they were deposited in the safe deposit vault. I don't think she was assessed taxes by the state of Tennessee and Davidson county. She paid some taxes, but just what amount or on what I cannot say now. It is right that as far back as 1912, 1913, 1914 and 1915, she was not assessed and did not pay any taxes on these bonds so far as I know. I could not tell you whether she paid any taxes back of 1912, or whether she was assessed any on these securities mentioned in this trust instrument. I don't think she was ever assessed for any personalty, but I am not sure. Up to that time, you know, the taxes were assessed to the firm; it was firm property. I think that these securities themselves were not taxed to Mrs. Dickel. All property, up to a certain time—I forget just when—was held jointly, and when we made this deed of trust, we separated it. We considered these bonds her property when the trust was made. Before that time, joint property. I don't think I listed these bonds for taxation before that time.

After this instrument was executed in April, 1915, after the trust deed was finally made, Mrs. Dickel did not have control over it if she desired to exercise that control. The trust was fixed. If she had wanted to change it, we would have let her do it. Mr. Vertrees can tell you better about that than I can. I understood the trust deed was irrevocable. As to how I understood it at the time it was executed, I had no understanding other than the trust deed itself.

"Q. What I mean is, when you and Mrs. Dickel talked over the matter of executing this trust and making these provisions in there about the disposition of the income, about the trustee and the beneficiaries.

"A. I was the beneficiary.

"Q. You were one of the trustees. Was it understood that if Mrs. Dickel desired to do so before her death, or

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at any time, that she might change this trust or even revoke it if she wanted to do so?

"A. I don't remember any such understanding, although it would have been done if she wanted it done."

She never mentioned that fact and I never mentioned it to her. It is correct that that was not a gift of any of the securities to any of the beneficiaries. It was merely a gift of the income through the trustee. It is a question you lawyers will have to answer and that I could not, whether from that point of view, she was really the controlling power up until the time of her death, of the instrument, being a party thereto. My understanding was that was final; that was an irrevocable trust, and that she, herself, could not have anything to do with it.

"Q. Could not control you in the matter of what you wanted to do with the income?"

"A. At her request, I would have perhaps done anything she asked. She had no legal right to change it, though.

"Q. As I understand you, it was Mrs. Dickel's desire that this instrument be created so that the property therein mentioned would go and be used for the purposes she would desire that it be used, after her death.

"A. Just as the instrument stated."

I don't know what the inheritance tax would have been in the state of Tennessee, if this property had been situated here at the time of Mrs. Dickel's death. I did pay an inheritance tax on the remainder of her estate. I paid Tennessee part. I paid the inheritance tax and also inheritance tax in the State of Michigan. I don't know how much that tax is. I know there is an inheritance tax, but don't know the percentage; I have forgotten. I paid on the realty here and the personalty in Michigan.

"Q. At the time of the execution of this trust instrument, it was Mrs. Dickel's idea that your children would ultimately enjoy her fortune, anyway.

"A. That is what the trust states.

"Q. And her idea was that after the execution of this trust, that in the event of her death, your children would enjoy the benefits of her interest to that extent, under this trust?

"A. In the event of her death, you say? That of my death, isn't it?

"Q. Her idea was, when she executed this instrument, that either in the event of your death or in the event of

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her death, your children would enjoy the benefits of these bonds?

"A. I guess that is right, in the event of my death of course it goes to the children.

"Q. Well, it would have gone to the children if she had died the day after she executed it, just the same as if she had lived on. I say, if you had died.

"A. Oh, yes, if I had died."

Before George A. Dickel's death, just he and I composed the members of this partnership of George A. Dickel & Co., and after his death, Mrs. Dickel took his interest in the firm and continued to hold all the interest her husband had in that business. I could not tell you now the amount of the interest she took at the time of the death of her husband. It would be a mere guess, but I would think about \$250,000. I cannot remember what securities we had then, but whatever we held were held by the firm. These securities mentioned in this deed of trust were owned jointly by me and Mrs. Dickel. I owned half of them and she owned half. I took an interest in something else to offset that—other securities. She transferred to me other securities she had; had the bookkeeper estimate what it was, and I took my share and she took hers. As to what she transferred to me of her interest, outside of this, to offset this, we had other securities, a number of other securities. Of course we estimated the value of such securities as we had. I didn't do it; I had the bookkeeper do it. I directed it, of course. Suppose we had two million; she would take a million and I would take a million. That is what was done. I took other securities or an interest in other property in return for the interest I had in these securities. We had a number of other securities, stocks and bonds of various kinds, Nashville & Decatur Railroad Company stock, Nashville, Chattanooga & St. Louis Railway stock, bank stocks and things of that description. As to what the extent of my interest was in this particular lot of securities, before the execution of this deed of trust, as I told you, we held all of the securities jointly; all the stocks and all the bonds, and a certain amount of stocks and bonds went to her and other securities to me, equal to the value of those she got. I guess I bought all of these bonds myself, as a member of the firm of George A. Dickel & Co. I bought them for the firm. We carried everything jointly. They were in the deposit vault. They were held on the books as the property of George A. Dickel & Co., and she and I constituted that firm.

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We only had one vault. The firm and she and I all had one vault, one box in the vault at the bank, safety deposit box; might have had two—no, we only had one box. At the bank all these securities appeared on the books as the securities of George A. Dickel & Co. and not as the property of Mrs. Augusta Dickel, nor as the property of V. E. Shwab. Some of these stocks or bonds were held by Mrs. Augusta Dickel in her own name for some years—money she received from abroad. I purchased her securities for that. I would say, as well as I can remember, that about \$30,000 of this principal sum of \$1,000,000 was individually hers before I offset this additional sum from the partnership.

“Q. After she made this trust instrument, her interest in the business of George A. Dickel & Co. was about a million dollars less than it was before she made it, was it not, excepting the thirty thousand dollars which you spoke of as being hers individually.

“A. It was about that much less in securities we jointly held. We were operating the firm.

“Q. I didn't catch that point exactly.

“A. Well, you know, the firm of George A. Dickel & Co. were engaged in a wholesale business and her interest continued the same in that firm, in whatever profits or losses accrued after that. When it came to the securities, of course she had that much less.”

After she drew out all this, she had the same interest in the profits of the firm and in the operation of it. She was still an equal partner. Part of this was mine and was offset by other property. She would not have a less interest in the firm than before. She would have less in the firm's holdings, for I took out the same amount she did. I took out an equal amount and equalized what she had put in this trust and put that to my personal account. We were still equal partners in what was left in the holdings of the firm. You could put it that this instrument was in the nature of winding up a part of her interest in that firm. It was in the nature of dividing up some outside assets of the firm. I had the firm's books to show that she had drawn out this amount of money—\$1,000,000, less that \$30,000 in securities. These securities that she drew out, she withdrew from the firm's assets and put in the trust.

I have managed and controlled her affairs since the death of her husband. I looked after her interests. I don't think I ever advised with her about the disposition of any property held by her. I did not advise her on talk

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with her in reference to those matters, for she told me to do what I pleased about it. I rarely ever talked to her. I may have told her afterwards what I had done, sometimes. My idea in executing this trust instrument was for the reasons I have already given, the tax question. The idea was, in the beginning, to find a favorable tax rate, where she could make a trust of this kind without being too heavily taxed, and to find the most favorable place in which to make it, and we found the laws of Michigan were more favorable than anywhere else. I liked Michigan, because I had spent a good many summers there. I don't think the fact that it was attractive in that respect also influenced us much.

I think we started out, if my memory serves me right, paying the Detroit Trust Company for handling these securities five per cent. and they afterwards reduced it to four per cent. as the trust was giving them so little trouble, and really promised to reduce it more. I would estimate the annual amount paid to the Trust Company on these securities, under that clause, about \$2,000 on the 4 per cent rate. On the 5 per cent. rate it would be about \$2500, of course.

"Q. Then the first year of the life of this trust, it would cost you about \$7500 to keep these securities in Michigan, that is, one-half of one per cent. tax for the first year, and the amount paid the Trust Company on the income, and then, after the first year, the expense of maintaining this instrument and the securities would be about twenty-four or twenty-five hundred dollars a year.

"A. The four per cent. rate, only two thousand dollars.

"Q. I say, between two thousand and twenty-four hundred dollars.

"A. I don't think the income was over fifty thousand dollars, if it was that, therefore it could not have been over two thousand dollars, or so little over it would not amount to much."

In order to get the benefit of the laws of Michigan under this trust, and to maintain the securities there in that manner, it was necessary for Mrs. Dickel to change her residence to Michigan. She did that. Mrs. Dickel's reason for not making Mrs. Shwab, my wife, the beneficiary under this deed of trust was that, at that time, Mrs. Shwab was, as I have already stated, in very bad health; not expected to live; didn't think she would live to come back, and of course Mrs. Dickel felt as though she would undoubtedly outlive Mrs. Shwab. Mrs. Shwab is still living. Mrs. Dickel knew further, or at least she

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felt so and so states in her will, that Mrs. Shwab would have enough to live on. Mrs. Dickel knew that I was a man of means and able to take care of Mrs. Shwab and that I would take care of her, and that Mrs. Shwab would always be well cared for, even though she should outlive me or Mrs. Dickel.

The principal reason for transferring these securities and the execution of this trust deed was the matter of taxation.

"Q. Mr. Shwab, the idea of executing this instrument originating in your mind, I mean the idea of depositing these securities in trust, that originated with you.

"A. Well, we discussed the idea of making a trust jointly. She favored it. She was constantly giving to the children as it was.

"Q. You talked to her about the proposition of making this trust.

"A. Yes.

"Q. After you had looked into the matter?

"A. Yes.

"Q. Your idea about that, in addition to the question of taxation, was to get the estate in good shape, and in addition, because in case she should die, that was one thing you had in mind, was it not, as a prudent advisor of her?

"A. Well, I can answer that by saying she had already made a will leaving her property to my children.

"Q. That may be so, but she made another will.

"A. Subsequent to this transfer.

"Q. You thought this would be a better disposition of the property in case she died, than was made by her will, did you not?

"A. Well, for the reasons already given, yes.

"Q. That is what I say.

"A. Yes, taxation."

As a wise and prudent woman, she agreed with me on that subject. After she had executed this trust instrument, she changed her will in that respect; she left everything to me in her last will. I think she did not in the first will. She made two wills. Mr. Vertrees can tell you about the first will. She left it to my children. Then she came to see Mr. Vertrees alone. I didn't know this until afterwards, and said she wanted to change that will, for reasons she gave him. She decided to change it when she made the will. I did not know it until afterwards. This last will was along about the time she executed this instrument, and then we left here in May or

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June, 1915, the latter part of May or the first of June, I think.

"Q. I believe you stated this morning these securities mentioned in this trust, were never assessed for taxation, and that no taxes were paid on these securities.

"A. I said I didn't give them in for taxation."

"Q. Of course, if you did not give them in, there was no tax paid on them. Do you know how much inheritance tax, if any, you paid on these securities in Michigan, state inheritance tax, under the state laws, or if you paid any?

"A. Oh, yes; I paid in Michigan. I can find that out exactly, for I have a receipt, but I cannot tell you the amount now. It was a pretty large sum, though, but I forget what it was, now."

I cannot state approximately how much it was, but I think if you will leave that blank, I can get it later.

(Requisite information inserted later.)

I find the inheritance tax that I paid in Michigan was \$21,499.00, but I haven't the date I paid it.

I paid an inheritance tax in the state of Tennessee on property owned by Mrs. Dickel. I cannot remember what the rate under the inheritance tax law of Tennessee was. However, that is a matter of record, and I can get that too, if you want it.

(The requisite information inserted later.)

I find that the inheritance tax in Tennessee, paid for the estate of Mrs. Augusta Dickel, was \$13,397.38, and that it was paid February 9, 1917.

After the execution of this trust instrument by Mrs. Dickel, her income from other property owned by her was very much in excess of her needs. Even after the disposition of this, her profits from the firm alone were very much in excess of her needs.

I don't know that the Trust Company advised me that I might make this deposit in trust in that state, and that I could take advantage, or rather, that Mrs. Dickel could take advantage of the tax laws of Michigan, without making an irrevocable trust, but as a citizen of Michigan she could have done that. I don't remember that the Detroit Trust Company wrote me to that effect on March 13, 1914. Possibly they did. I know any citizen of Michigan could take advantage of those laws. In my letter to the Detroit Trust Company of April 15, 1915, I called the attention of the Detroit Trust Company to the fact that Mrs. Dickel was a widow, without children, and that she was up in years. I think I talked to Mrs. Dickel

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about the difference between this instrument and the one Mr. Vertrees, my counsel, first drew for that purpose. That is, I mean the first trust deed and the second. I have no recollection of having talked to her with reference to the feature of the change in the manner of income to her for life. As to whether that feature was mentioned at all, or whether she suggested that inasmuch as she had sufficient income, she might just make that change, or whether it was necessary that she have the income—we may have talked that over; I don't remember. I remember her idea in changing her will and not leaving it direct to the children, which she had already done, you know. I don't doubt that was her idea. She had plenty of income without it, more than sufficient and we might have talked it over.

"Q. Well, wasn't it your idea and wasn't it her idea, too, that this income for life from this deed of trust was not really necessary, inasmuch as she had sufficient income to meet her needs, and wasn't it also your idea she probably would not live a great many years and that feature of it would simply be necessary to be handled again.

"A. That never entered my mind, for the will would have been just the same, don't you know, as the deed of trust, but the idea I have in my mind now was that this, coming from that deed of trust, the income, would be reinvested by me, and in that way accrue to the estate and children, which has been done.

"Q. Now, Mr. Shwab, at the time that you and Mrs. Dickel and your wife executed your wills, isn't it a fact that both you and Mrs. Dickel, as a wise and prudent woman, and you as a wise and prudent advisor to her, thought that inasmuch as both of you were getting up in years, it was the proper and wise thing to do to make a final disposition of your property by will, even though you did make it because your wife was sick, and that she was making her will. I say, that was one of the features?

"A. It is always a wise and prudent thing to make a will, regardless of your age or years."

Mrs. Dickel had changed her residence to Michigan when that will was made. Mrs. Dickel spoke to me about Mr. Spicer. I know that she was impressed with him. I don't think I asked her and I don't think she told me what the conference was about, on the occasion when he came down and went out and had a talk with her. Of course, I knew in a general way what he went out there for.

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Mrs. Dickel became ill about two or three weeks before she died, something like that. I never knew what her trouble was, but I think she had a stroke of paralysis. I don't know whether or not that was caused by anything else. I had an idea it was the shock of that fall that produced it, but I don't think I ever inquired of the physicians on that point. Dr. Armstrong, of Charlevoix, Michigan, treated her in Michigan.

I have forgotten the amount that constituted Mrs. Dickel's individual holdings at the time of her death, out side of the partnership holdings in the firm of George A. Dickel & Co., but it is stated in that paper Mr. Vertrees had a while ago, in the declaration, both to the Government and to the State and County, we reported her real estate holdings, and also her personal holdings in addition. We included in this her interest in the firm, too. We included everything she had. As to what she held outside of the firm, the real estate values were there. Everything was held in the firm, you know. Outside of the firm she had one or two pieces of realty. She had a house and lot, a half interest, she and my wife owned, on the corner of Eighth Avenue and Church Street, and she had an interest in some other real estate jointly with me. Mrs. Dickel had very little interest, other than her interest in the business of George A. Dickel & Co. and some little property, perhaps. She had several pieces of realty, but not of large value, outside of that I have mentioned.

Redirect Examination.

By Mr. Vertrees:

I was advised that the state of Tennessee did not permit any such placing of stocks and bonds in trust, on payment of a percentage, and thereby escaping other taxes. I was so advised.

"Q. Now, as to the property of George A. Dickel & Co., do I understand you, in your cross-examination, to have stated, first, that there was what you might call the capital stock of Geo. A. Dickel & Co., that they were operating on."

"A. The amount employed in the business. And then outside of that there were stocks and bonds that were held that had been made as profits one way or another, either in business or stock investments or other business deals. I managed all of it. All of these extra stocks and bonds were held in the name of George A. Dickel & Co. I expect I had some few of my own. Any invest-

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ments of surplus money made by George A. Dickel & Co. in bonds and stocks, of course belonged to George A. Dickel & Co. They were kept along in the name of George A. Dickel & Co. No stocks or bonds, as profits of the business, were at any time given over to Mrs. Dickel, to keep and put in her box as her things. She did not keep a private box at the bank or in the trust company or anywhere. I did not keep one of my own apart from George A. Dickel & Co., had only one box. I had a box of George A. Dickel & Co. at the First National Bank until it consolidated with the Fourth, and then had it there at the Fourth and First National Bank.

When these bonds were placed in this trust, they were absolutely delivered to the Detroit Trust Company. That was done when the instrument was executed, as soon as we signed it up and sent them the securities. Mrs. Dickel did not personally take into her custody or possession these bonds that were put in this trust company. Up to the time they were delivered to the Detroit Trust Company, they were in the safe deposit box, under the control of George A. Dickel & Co. or me as the principal man of that firm. She had nothing to do with the actual physical transmission or delivery of those bonds. The bonds that she did have that I estimated at about \$30,000 were from money that came from an inheritance that she had from Germany.

Dr. Armstrong was the physician who waited on Mrs. Dickel in her last illness, which was at Charlevoix, Michigan. He is living.

I estimated the value of the whole of the assets of George A. Dickel & Co., at the time Mrs. Dickel died, at about \$500,000. Mrs. Dickel's interest would be half of that. At the time Mrs. Dickel died, she was possessed of in the neighborhood of \$800,000, outside of the trust, so at the time the trust was made, she had something like a million, seven hundred thousand dollars. At the time when she died, there could not have been a great deal of difference in the value of my estate. I might have had a few thousand dollars more; it was practically the same. Mrs. Dickel knew I was a man of means and substance.

Recross Examination.

By Mr. Littleton:

These assets that Mrs. Dickel deposited in the trust, at the time she deposited them or had them deposited, represented a part of the income from the business of George A. Dickel & Co., in which she was entitled to one-half,

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and these bonds and stocks which she withdrew at the time she withdrew them and placed them in trust, she was drawing out a part of the accrued interest on that business and other investments I had made; that is, from the firm business and investments. Therefore she was really individually entitled to the amount really drawn out of the business.

George A. Shwab became a partner or became interested in the business of George A. Dickel & Co. some years after Mr. Dickel's death, but I could not tell you exactly when. He had an interest in the profits of George A. Dickel & Co., the operating firm, and when he came in, these securities were still retained that way, but he had no interest in them. He had no capital in the firm, no interest in the capital stock of the firm; he had put in no capital, and we just gave him an interest in the profits of the firm.

Mr. Keeney: Your Honor, to complete the formal record, I wish to offer in evidence the notice and demand for payment of the tax, under date of December 7, 1917.

The above notice was introduced in evidence and marked Exhibit "S."

Mr. Keeney: Also the receipt of the Collector, under date of December 15, 1917.

The above mentioned receipt was introduced in evidence and marked Exhibit "T."

Mr. Keeney: Also a duplicate of the last mentioned receipt, the duplicate being attached to a letter from Daniel C. Roper, Commissioner of Internal Revenue, addressed to Victor E. Shwab, Executor, Nashville, Tennessee, under date of May 27, 1918, denying a refund:

The duplicate receipt above mentioned was introduced in evidence and marked Exhibit "U," and the above mentioned letter of date May 27, 1918, was introduced in evidence and marked Exhibit "V."

The Exhibits "S," "T," "U," and "V" were read in evidence by Mr. Keeney.

Mr. Keeney: Mr. Walker, there is a very slight discrepancy here, to which I want to call attention, just to avoid any misunderstanding. The application for refund is stated as \$56,546.41. That is the amount of the check that was tendered for the balance of the tax, but at the time of the payment, Dec. 15, 1917, the collector concluded that that was two dollars too small, and I contributed a two dollar bill out of my own pocket at the time, so that the amount that was actually paid on December 15, 1917, was \$56,548.41 instead of the \$56,546.41.

John Jacob Vertrees.

The deposition of

John Jacob Vertrees,
a witness in behalf of plaintiff, which deposition was
taken at Nashville, Tennessee, on February 26, 1919, was
read in evidence by Mr. Amberg.

Direct Examination.

(By agreement, Mr. Vertrees gave his direct examination in narrative form.)

I am nearly sixty-nine years of age, and reside at Nashville, Tennessee, and am a lawyer by profession. I have been practicing law at the Nashville, Tennessee, Bar since 1881. For many years I have been the attorney, or, as it is commonly called, the lawyer of George A. Dickel & Co., and of the persons composing that firm.

I am acquainted with Mr. V. E. Shwab, his son George A. Shwab, Mrs. Emma Shwab, wife of V. E. Shwab, and I was also acquainted with Mrs. Augusta Dickel. I never knew her husband, George A. Dickel, deceased.

During this time, I have represented the firm of George A. Dickel & Co. and Mr. V. E. Shwab in any matters they might have had, and feel that I was reasonably well acquainted with the general condition of their business affairs.

Mr. V. E. Shwab was the active and controlling spirit throughout this time and until the last few years. He indeed is the senior member of the firm now, but the business is now being managed principally by his sons, George A. Shwab and Hugh M. Shwab.

I do not recall that ever at any time in any matter that I have had for George A. Dickel & Co. that Mrs. Dickel ever conferred with me with respect to it in any way, either in person or by letter.

The only time that I came in contact with Mrs. Dickel in a business way was on several occasions when there were matters that were personal to her. I recall that I wrote her will, and a memorandum that I have shows that will was written in 1906. Later, I should say about 1911 or 1912, Mrs. Dickel and Mrs. Shwab became entitled to an interest in an estate in Germany. I had prepared powers of attorney and other documents with reference thereto, for Mrs. Dickel and Mrs. Shwab, as each was to receive the same amount. I have heard Mr. Shwab's deposition and he states it at about thirty thousand dollars each. My memory is that it was about twenty-five thousand dollars each, but I am not sure.

Then, again, at a date I am unable to state, I believe

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that I wrote a will for Mrs. Dickel, but I can find nothing to state when that was, but I have the impression that I did so.

The matter of the execution of this deed of trust was suggested to me, as an attorney, by Mrs. V. E. Shwab, with a statement of what was desired and what they had in mind. Mrs. Dickel did not confer with me at that time upon the subject. Thereupon I wrote the letter, at his suggestion, to Messrs. Travis, Merrick & Warner, of Grand Rapids, Michigan, a copy of which has been filed as Exhibit "G" to the deposition of Mr. V. E. Shwab heretofore taken in this case, and I received in reply to that letter to them, a letter dated February 11th, 1914, which is filed as Exhibit "H" to the deposition of Mr. V. E. Shwab, heretofore taken in this case.

After investigations had been made as shown by the letters which have already been exhibited by Mr. Shwab, I proceeded to draw a deed of trust, and did draw one. It has been my habit for some years to leave Nashville as soon as possible after the 4th of July, to spend some time in the South, usually about two months. I find that on June 18th, 1914, I wrote a letter from Nashville, Tennessee, to Mr. V. E. Shwab, at Charlevoix, Michigan, a copy of which letter I here file as an exhibit to this, my deposition, and I have the original now before me, which has been delivered to me by Mr. Shwab, indeed was placed in my hands or custody in 1915, when the second deed of trust was being prepared. That letter and other papers were handed to me by Mr. Shwab, but I will file the copy, as it is cleaner, unless the original is desired.

Said letter of June 18, 1914, was introduced in evidence and marked Exhibit "W" and read by Mr. Amberg.

While I do not recall with exactness, I am quite sure from that letter and from what I do remember, that I prepared the deed of trust referred to, about that time, and either delivered it to Mr. Shwab before he left for Michigan, or transmitted it to him by mail afterwards, but I am unable to state which.

As will be seen from the letter, I made various suggestions as to changes. I heard nothing from Mr. Shwab upon the subject, and about the 6th or 7th of July I left Nashville and did not return until early in September, 1914.

I do not recall with exactness when the matter was taken up again. I do know it was some time in the spring of 1915, and if anything was done by me in the

John Jacob Vertrees.

summer of 1914 or winter of 1914-1915, I do not recall it now. But Mr. Shwab did present the matter to me again, and then it was taken up, and the Detroit Trust Co. was communicated with and their representative, Mr. Charles Spicer, a stranger to me, Vice-President of the Detroit Trust Co., came down here in April, 1915. I had, before his coming, prepared a deed of trust to be executed, and when I did this, the one which has been prepared, the original draft, which had not been perfected, was destroyed. I have a memorandum here which says this: "April 22nd, 1915. This letter"—meaning the letter of June 18th, 1914, written by me to Mr. V. E. Shwab—"refers to an instrument prepared by me as stated, and it was actually signed, though never acknowledged by Mrs. D. It was never used or even seen by the company, and was destroyed by me when another deed of trust was drawn up, April 20, 1915. J. J. V." The "Mrs. D." referred to is Mrs. Dickel, and the company referred to is the Detroit Trust Co.

Mr. Spicer came to my office and he and I went over the draft of the deed of trust which I had then prepared, that is, in April, 1915. Various changes were made, which necessitated a re-drafting of the instrument. After it was completed and we had agreed upon its terms, he then said that he had not seen Mrs. Dickel and would like to see her personally. He reported to me later that he had been out to see her, but I did not accompany him, and I was informed that he went out alone, it having been arranged that he should see her.

The deed of trust was acknowledged, and Mr. Spicer left for his home. At a later date, in the month of May, I was directed to prepare wills for Mrs. Dickel, Mrs. Shwab and Mr. Shwab. I do not recall now from whom I received my directions, that is, whether they were through Mr. Shwab or one or the other of the ladies. I am inclined to think it was Mr. Shwab. I prepared the wills in accordance with instructions and sent them out and was requested to come out there at the time they were executed. I was advised at the time that the three wills were being executed at the same time because of Mrs. Shwab's condition, that it was supposed this would excite her less than if she was called upon to execute a will alone.

Mr. Walker: I think I will object to that as incompetent.

The Court: I suppose it is the same subject gone into. I think I will permit the answer.

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Mr. Walker: An exception.

The Court: Because of the sickness of Mrs. Shwab.

I had previously prepared a will, as I have stated, for Mrs. Dickel, and also one for Mr. Shwab, not as elaborate as he desired, but sufficient for all purposes. I do not recall the exact date when that will was prepared, but I did prepare these three wills, went out to the residence, and in the same room, and at the same time, the wills were executed by Mrs. Augusta Dickel, Mrs. Emma Shwab and Mr. V. E. Shwab. This, as the date shows, was on the 22nd day of May, 1915. They all, very shortly after, left Nashville for Charlevoix, Michigan.

I recall with distinctness that at this time or shortly before, Mrs. Dickel came to the office, and came alone and said, with reference to her will, that she wanted it changed, that instead of giving the property to her sister, she desired to give it to Mr. Shwab or "Mannie," as she called him, stating that he practically managed everything anyway, and his wife, should she survive, would be annoyed by the children calling on her, and it was better for all concerned that it was placed in his hands, instead of in hers. I recall distinctly her return to the office and her statement with reference to the change, but I am not distinct as to when that will had been made that she desired changed; whether it was one made some little time before, or whether it was the draft of the will sent out then to be executed, but I do recall with definiteness that conversation and the directions as to the change.

I can say with reference to the relations between Mrs. Dickel and Mr. Shwab and Mrs. Shwab and the children of Mr. and Mrs. Shwab that I can give no better idea than that expressed in her will with reference to them. I saw nothing, at any of these interviews or at any of these times, to indicate that Mrs. Dickel was not in her usual health, or that she was disturbed in any way, or that she thought she was making any preparations with reference to the disposition of her estate because of any apprehension of impending death or anything of that kind. I knew as a fact, or I think I knew, the prime object was the tax advantages which it was supposed the laws of Michigan gave, with reference to the matter of the payment of a small percentage, one-half of one per cent., in lieu of all state, county and municipal taxes. As a lawyer I realized that was satisfactory, as I understand it, although it could be changed, and it was for this reason that the clause was inserted in the deed of trust

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giving certain parties the power, not to revoke the trust, but to remove the trustee or substitute the trustee even in another state.

So far as I could see and observe, and I believe it to be true, that the relations of all of these people were affectionate; that the only persons Mrs. Dickel expected ever to enjoy her estate was the Shwab family. She had been generous with the children and it was her desire that at her death, whenever that should happen, they were the people she expected to receive the benefits. And she had no other near relatives, as far as I knew or was ever advised. At the same time, this deed of trust, as far as I knew or had any reason to believe, was not executed by reason of any apprehension or fear on her part, of anything impending.

Mr. Walker: I move to strike out commencing with "as far as I knew;" incompetent and immaterial.

The Court: I think that may go out.

Mr. Amberg: I note an exception.

I will add that the laws of Tennessee do not afford any such inducement as that which we understood to be afforded by the laws of Michigan, but all property must be taxed, and the law is that taxpayers must make returns of their property, or, if they do not, that then the assessor assesses according to his own judgment in the matter, and such has been the law for years in this state.

I know that when the matter came up, Mr. Shwab conferred with me upon the subject of the taxes and the government's claim, and thought it proper and advisable to send a copy of the deed to the authorities at Washington, or rather, to Mr. Doyle, the Collector, himself, to the end that there might be nothing suggested about it by anyone on the outside—a proffer to send affidavits, and when it was intimated that they were desired, the affidavits were prepared. I prepared various affidavits, including my own, and they were forwarded, and I presume the government has mine and the others now.

When the question of bringing suit came up, counsel were employed in Michigan, and the suit was brought. I do not recall that I ever saw Mrs. Dickel after the will was executed by her in May, 1915.

Cross-Examination.

By Mr. Littleton:

"Q. Mr. Vertrees, I will ask you to kindly explain the following clause in the deed of trust in question:

"It is further understood and agreed, that during the life of Victor E. Shwab, he, the said Victor E. Shwab,

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shall have, and by Mrs. Dickel is hereby expressly given the right and authority to demand, in writing, a sale by the company of any part or all of the securities or properties in which said trust estate is now or at any time during his (Victor E. Shwab's) life, may be invested, and upon such demand, the company agrees forthwith or as soon as practicable thereafter, to sell the securities or properties so demanded to be sold, such sale or sales so made, as well as any sales or exchanges at any time made by the company hereunder, to be made at current market prices. Any sale made as above, under demand of Victor E. Shwab, shall be without liability or responsibility on the part of the company."

"A. As I recall, the idea was this, Mr. Littleton: That here were a number of securities, bonds and the like, that were put in trust to be held for a very long time, a number of lives in being and out of them it might be well supposed some of them would be pretty long lived, and bonds vary much during the years, they depreciate, and to the end that if it was discovered that that was taking place, that any securities were falling in value, and liable to go down, to sell them while they could, if in the judgment of Mr. Shwab it should be done, and it gave the power to him, first because I looked upon him as a man deeply interested in all of the beneficiaries, and secondly, as a very capable business man, and the idea was that his judgment on that should be considered about as good as anybody's, and if at any time he thought stocks should be sold, and the proceeds substituted, it should be done. It was not at all the idea of Mr. Shwab or Mrs. Dickel or any of the parties to this deed of trust that she should be consulted. The sole idea, as I recall it, was as I have stated. The fact of the business is, I don't know but what I might have inserted that clause or it may be that Mr. Shwab insisted on it. In reality, bonds in those trusts sometimes diminish very much and are held longer often than they should be; and it was to meet a contingency like that, and he was selected because he was supposed to be a man who knew about those things, had been a very active and a very successful business man. As I stated originally, Mr. Littleton, I do not recall that she ever spoke to me in her life on the business of the firm of George A. Dickel & Co. or her own business, or any business, excepting the things she had personally to take part in, for instance, the will, she had to execute that, and I saw her about that, and those powers of attorney and that deed of trust. Now, as far

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as the business of the firm of George A. Dickel & Co. was concerned, I saw Mrs. Dickel but few times, and if she ever mentioned the business of George A. Dickel & Co. to me, except in so far as it related to those things, I do not recall it.

In any matter that I transacted for that firm, through her agents or representatives, her interest was not ever brought up in any way before me, and this was the situation as I understood it. It was really Victor E. Shwab. I might give just a little history of it. I have heard from Mr. Shwab, I have never talked to Mrs. Dickel or Mrs. Shwab upon this subject, that that old firm of Dickel & Salzkotter, Mr. Shwab entered with them as a clerk and was also their bookkeeper and salesman, and he proved to be pretty active and they admitted him to a very small interest, and then, if I may use a popular expression, they fell out with each other and would not speak to each other, but talked through him entirely for quite a while. But they still remained partners. That probably lasted a year or two, and old man Solzkotter died, and then Mr. Shwab was admitted to an interest with Mr. Dickel. All this is what I get from him, he being the active man. He showed up as a business man and the firm prospered very greatly; and when Mr. Dickel died, it was desired that Mrs. Dickel's interest should remain in the firm. If she ever, in the sense of looking after the business, came to, or inquired about it in any way, I have never heard of it or known of it.

I have always found Mr. V. E. Shwab to be a very active, energetic, capable business man. He was the only man that ever talked to me at all until his son George grew up and became the active man, and then George began to advise with me about that. They really have had very few lawsuits, but Mr. V. E. Shwab is a very capable business man and I have always so regarded him.

"Q. You have always found that he was a man that never let anything lag or get into bad shape, either the business or his personal affairs?

"A. Really, one of his troubles is that he is a little too much that way. Take the matter of his will, I suppose he came to me or my office in the course of years, many times, saying, "Mr. Vertrees, I declare I ought to make my will," and I would say, "All right," and he would say, "I will come up shortly and do that," and that would be the last of it, but as far as business is concerned, I think he acts on it and attends to it. He has a

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good insight into the future and has been very successful. They have made a great deal of money. When I was called out to write these wills for Mrs. Shwab and Mrs. Dickel and Mr. Shwab, I should say he requested me to do that, but I do not recall. The wills were all typewritten here at the office. I do not recall in the slightest which was written first; I only recall this fact; I know they were prepared to be executed at the same time, and were written by my typewriter, Miss Collier then, who has since married, but who is still with me, and they were taken out and executed at the same time. I do not recall, when I went out there, whether I took the matter of preparing Mrs. Shwab's or Mrs. Dickel's or Mr. Shwab's first. To my recollection, the last time I saw Mrs. Dickel was on that occasion. She went to Charlevoix, Michigan, that would be May, 1915. She was back here the winter of 1915 and 1916, but I do not recall to have ever seen her. I am sure I did not have any business with her, but I do not recall to have seen her from that time on, as stated.

"Q. Mr. Vertrees, during the preparation of this trust deed and during that time that you and Mr. Shwab were considering the matter of making this trust deposit with the Detroit Trust Co., throughout these negotiations it was understood, of course, and naturally entered your mind at the time, as well as in your conversations with Mr. Shwab, that Mrs. Dickel was an old woman?"

"A. Yes.

"Q. And possibly could not live many years longer?"

"A. Reasonably could not be expected she would live many more years.

"Q. And this was a wise precaution?"

"A. Yes, and I think, in fact, it is wise for anyone. I keep my own will by me and I think every one should."

The matter of different inquiries made to the different persons and concerns before the Trust Company was finally decided upon was for the purpose of securing one that would be best and most acceptable to the parties. Two things, of course, were considered in that. One was a responsible and reliable concern; and the other was a state in which this tax question would operate. I recall now, since you have mentioned it, that one or two states were considered. If my memory serves me correctly, New Jersey was one, and New York also. I know that more than one state was considered, and thinking it all over, that refers me to another matter, that there was more than one trust company considered in Michigan.

Dr. Duncan Eve, Sr.

That was just one of the demonstrations on the part of Mr. V. E. Shwab that I have seen throughout my association with and representation of him in his business, of his active business insight. I thought it was a sensible thing to do and it originated with him, not with me. I don't know where he got it, but I was merely carrying it out for him.

I understand the property of Mrs. Emma Shwab, wife of V. E. Shwab, to be of the value of about \$70,000, about one-half personalty, which is bonds and stock, and the other real estate in the county of Davidson, state of Tennessee, most of it in the city of Nashville.

The deposition of

Dr. Duncan Eve, Sr.,

a witness in behalf of the plaintiff, which deposition was taken in Nashville, Tennessee, on February 26, 1919, was read in evidence by Mr. Amberg.

Direct Examination.

By Mr. Vertrees:

My age is sixty-six. I live in Nashville, Tennessee. I have lived at Nashville all my life, except two years refugeeing during the war. I have a profession. I am a surgeon. I have been a surgeon forty-five years, located at Nashville, Tennessee. I am acquainted with the plaintiff, Mr. V. E. Shwab. I have known him ever since I have lived in Nashville. I am acquainted with Dr. W. A. Oughterson of this city. I have practiced as a physician and surgeon in the family of Mr. V. E. Shwab. I have treated some of Mr. Shwab's sons, two of them, and I believe I have treated Mr. Shwab, as well as Mrs. George A. Dickel. I treated Mrs. Dickel as a surgeon, in the latter part of May and first of June, 1916. Previous to that time I had never attended her as a physician or surgeon. Dr. W. A. Oughterson called me on that occasion. Mrs. Dickel, at that time, had what is called a Colles fracture, which is just above the wrist. I have forgotten which arm it was. Dr. Oughterson had given her the preliminary treatment, the fracture having occurred just a little while before I was called in. It may have been a day or two, and she not being in condition, as the result of the fall that produced it, to have it reduced, Dr. Oughterson instituted treatment for the reduction of the swelling or to get it in proper shape for reduction. When I was called, we gave her an anaesthetic and reduced it, or set the fracture and immobilized it, or placed it in splints.

Dr. Duncan Eve, Sr.

That was on the 26th day of May, 1916. I attended her until the 13th of June following. I may have seen her perhaps twice a day for the first few days, but after that I only saw her, at first every day and then later every other day. I ceased to visit her the 13th day of June, 1916, because she went with Mr. Shwab and his family to Charlevoix, Michigan. Prior to that time, that is, during the last part of the period in which I was seeing her, her condition was very favorable, but the time had not been sufficient for the union of the fracture, and when she left here, she had the dressings or splints upon her arm, and, of course, had to be treated further at the place she was going. She was not confined to bed at all, with the exception of perhaps the first and second day. She was confined at first because she had to have an anaesthetic, not only for the purpose of relaxing her, but to reduce the fracture and also to relieve her pain. I never saw her any more after she left; I never saw her again. It is my understanding she returned home and died a short time afterwards, but she may have died there and her remains brought here.

I have known Mrs. Dickel for twenty years or more. I knew her with sufficient intimacy to speak of her at this time, I mean when I was seeing her, as to her mental and physical condition. It was first class. She was a wonderful old lady in her vitality, and her mental condition was as strong as anyone I ever knew at her age, and in justification of that statement, I might state any anaesthetic produces great excitement mentally, usually, but she took this and reacted from it as nicely as anyone I ever saw, and only remained in bed about the time we expect, and when she was up she engaged me most intelligently in conversation, in answer to questions as to her condition or anything else I talked to her about.

I had various conversations with her. I found her so pleasant I oftentimes tarried and talked with her. I knew she was a well traveled woman. She told me a great deal about her travels, on one occasion—

“Q. Do you mean abroad or in this country? A. Abroad.”

During this period she was not at all apprehensive of death or anything like that. If she was, she did not manifest it in any manner or mention it. She said nothing at all about her end being near or about the disposition of her property; acted more like a young person and thought she had a long lease on life. She talked it and acted it; happy in every way.

Dr. Duncan Eve, Sr.

Her personal relations with Mr. Shwab were very pleasant. She was his wife's sister. Her relations with Mrs. Shwab and her children were very pleasant indeed; in fact I might say as intimate as might be expected, on account of the children. More particularly would I refer to them and the way they were thought of by her, as much so as if they had been her own.

As to her physical condition, her general condition at that time, aside from the injury I have spoken of here, was very good. If it had not been, this injury she had received, and especially giving her anaesthetics for the purpose of reducing the fracture, would have entailed on her or required her to remain in bed a good deal longer than it did, hadn't her condition been first class. She never complained of any of the ordinary conditions that old persons do. In fact she had the appearance of getting along well, being happy and moving about. I would find her out in the hall, even, see her walking about, getting up easily, always got up when I went in, saying, "Let me show you how well my arm is doing." She moved it when I removed the dressings and she would say, "So well it looks as if I could use it." If she had had any complaint, or been old and feeble, she would not have been disposed to have said anything of that kind.

I don't remember that I ever treated her previous to that time, as a physician or surgeon.

Cross-Examination.

By Mr. Littleton:

Mrs. Dickel never talked to me in any way about any of her business affairs; never mentioned that. I don't know anything about the execution of the deed of trust that is in question in this case. I didn't know really what my deposition was being taken for. She never talked to me about changing her residence to Michigan at any time.

"Q. You say Mrs. Dickel was an exceptional woman for one of her age, yet even with that, a person having reached the age that Mrs. Dickel had, about seventy-seven or seventy-eight years old, cannot reasonably be expected to live a great many years after that.

"A. No, I would think not, but if ever the occasion occurred to her that she was to die soon, she certainly did not mention it to me, or didn't act in such a way that she had the least idea of such a thing. They don't usually act that way; they act most usually just the opposite.

Defendant's Statement.

"Q. As a rule, people with a high degree of intelligence, having arrived at that age, they usually feel more or less inwardly that the end is almost near?

"A. Yes, but they don't want to acknowledge it, I don't think. Most old persons I have come in contact with do.

"Q. Doctor, you didn't have any occasion to talk to Mrs. Dickel about the probability of her passing away, you were there more as a surgeon than anything else?

"A. No. But, as I have stated, I engaged her, or she did me, rather, in ordinary conversations, and I happened to mention something about having been across the water, where I had been attending a post graduate course, and we then talked about places we both had been and I found her so agreeable that our conversations were longer than they would have been had it not been she was so inclined to be pleasant and talkative, but nothing at all in regard to her age. If it was ever mentioned, I do not recall it, or in regard to this matter you spoke of, this deed of trust.

Defense.

Mr. Walker made the opening statement for the defendant, among other things stating the following:

"We will prove also one or two other matters that we deem material. It appears that this trust was created somewhere between the 21st day of April, 1915, and the 5th day of June, 1915, when the trust instrument was finally acknowledged by the Detroit Trust Company and shortly after that the bonds were sent or "shipped" by Mr. Shwab to the Detroit Trust Company at Detroit. That was in the year 1915. Prior to that time the Congress of the United States had enacted the Revenue law of October, 1914, which imposed a tax upon the income of individuals that was above a certain amount and which required a sworn return of the income of each individual beyond a certain amount and allowed certain exemptions. We will show that for the income tax year ending on the 31st day of December, 1915, that is the year that the trust was made, Victor E. Shwab as Agent of Mrs. Augusta Dickel, made an income tax return for her and in so doing included in a sworn return as such agent, the income arising from these bonds paid in October, 1915, to Mr. Schwab, for which a receipt of Mr. Schwab has been introduced here. That is that Mr. Schwab as Agent of Mrs. Dickel, included that income from such bonds in the return which he made for Mrs.

Defendant's Statement.

Dickel for that year, treating it as her income. That for the next year, the year in which she died, as you will remember, on the 16th of September, 1916, and the income tax returns for that year which Mr. Schwab made on the one hand as the Executor of the Estate of Augusta Dickel, deceased, on the other hand for himself in his individual capacity he did not include the income of this trust fund either as belonging to Mrs. Dickel's estate and to be returned by him as such Executor or as belonging to him individually and to be returned and accounted for by him though he had given receipts for the income individually during that period of time. The inferences whatever they may be are not for me to draw at this time from any of these facts.

And we think also that some of the proofs we offer and some that is already in, will warrant—that will be for the court to say, all of these questions of law are finally for the court to say—I think it will warrant the submission to you of the question of whether this income from this trust fund, though under this trust instrument in terms payable to Victor E. Schwab and no interest reserved to Mrs. Dickel in it, that is clear under the instrument—the income payable to Victor E. Schwab as long as he lives, and though so payable, we think the proof will warrant submitting to you the question of whether there was, outside the instrument, some understanding or agreement between Mrs. Dickel and Mr. Schwab, that the income, in whole or in part, should be paid to her; that that is the explanation of this income tax return of 1915, and if so we shall ask that the court submit to you the question of whether or not this gift, this trust instrument, was, in fact, under all the circumstances, to take effect in possession or enjoyment at once, or to take effect in possession or enjoyment when she died; that is whether the income was to go to Victor E. Schwab, as directed, at her death, or whether she was to have a part of it."

After the opening statement of Mr. Walker, the jury was excused and the following occurred in their absence:

Mr. Keeney: May it please the Court: the point that I desire to present to your Honor relates to some matters that were brought out upon the opening statement of the District Attorney last night, just before the adjournment. I understood him to say that in behalf of the defendant in the instant cause it was his purpose to introduce in evidence upon this trial certain income tax returns made by

Defendant's Statement.

Mr. Shwab personally or as executor, for the years 1915 and 1916, if I correctly apprehended what the District Attorney said, it is that he intended to show from those returns, first that for the year 1915, Mr. Shwab did not return as a part of his personal income, the interest upon the securities which during that year were placed in the hands of the Detroit Trust Company, but that the income from these securities that year was embraced in the report that was made by him as executor or as representative of Mrs. Dickel, and for the year 1916, I understood him to say that he intended to show that the income from the Detroit securities was not returned as a part of the income of either Mr. Shwab or Mrs. Dickel.

I thought it proper, may it please the Court, to bring this matter to the attention of the court as soon as I could do so. I was not aware, until the District Attorney brought the question up last night, that there was any question arose upon income tax returns in this case, and I cannot think that in an action of that kind, those income tax returns are admissible in evidence; it does not seem to me that such is the intention of the law. This is not an income tax case, but one that involves an estate tax, and it would seem to me clear that under the law and the regulation, these documents are not admissible for any purpose in this case, certainly not in the absence of express order from the Secretary of the Treasury himself, granting permission to make such use of them.

I might perhaps defer the making of objection until those papers are offered upon the trial, but it seems to me that I ought to make it promptly upon its first being called to my attention that such papers are in possession of the District Attorney.

I cannot believe that, under the law, the District Attorney has any right to be in possession of those documents, this not being an income tax case. I cannot see, in the first place, what pertinence these documents may have, even if it did appear that for a part of the period subsequent to the execution of this paper, some of the income upon these securities has been turned over to Mrs. Dickel; I am at a loss to see how that can affect the issues that arise in this case; but the point to which I now address myself is that the district attorney ought not to be in possession of these returns, and I so desire to move the court at this time that the certified copies of these returns, or the originals, whichever they are—

Mr. Walker: I have both certified copy and original,

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I have the certified copy and Mr. Kelleher, the Commissioner of Internal Revenue, has the original.

Mr. Keeney: I desire to move, with reference to this matter, that the originals of these income tax returns be directed by the Court to be sent forthwith, returned forthwith to the Commissioner of Internal Revenue, and that the certified copies thereof either be delivered up to the plaintiff in this case or be forthwith returned to the Commissioner of Internal Revenue, and the grounds of this motion are, first, that it does not appear that these returns or the certified copies are furnished upon the approval of the Secretary of the Treasury; and, second, that they are not furnished for use in the trial of a cause in which both the United States and the persons rendering the return are parties.

The motion that I make here is based upon the statements made by the United States District Attorney and also upon the statutes of the United States and the regulations of the Treasury Department.

My object in making the application at this time in the form of a motion to this court, rather than awaiting the offer in evidence of these papers and then making the objection is this: I desire to take advantage of the rule which was laid down by our Supreme Court in the very recent case of *Prople against Marxhausen*, in 204 Michigan, page 559, and also the rule which is laid down in the case of *Weeks against the United States*, in 232 U. S. 383, and that rule, I take it, is this: that if the Government, as one party to a cause, is in possession of evidence which ought not properly to be used in a case, a proper form of application is by petition or motion to the court in that cause to compel the delivery up of the evidence which is so improperly obtained for use."

The motion above made was argued to the Court by Mr. Keeney for the plaintiff, and Mr. Walker and Mr. Kelleher for the defendant.

It appeared from Mr. Walker's statements on the argument that the certified copies of the income tax returns had been obtained by him on the 20th of May, 1919, from the Commissioner of Internal Revenue, in reply to his request written the Commissioner on April 28, 1919. Attached to the certified copies were certificates signed by the Assistant Secretary of the Treasury, as follows:

United States of America.

Treasury Department, May 17, 1919.

Pursuant to Section 882 of the Revised Statutes I here-

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by certify that the annexed are true copies of the income tax returns of Mrs. Augusta Dickel for the year 1915 and 1916, on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary.

Jowett Shouse,

Assistant Secretary of the Treasury.

Treasury Department

Chief Clerk and Superintendent.

Form 66

Ed. 5,000 Jan. 31, 19.

duly sealed under the seal of the Treasury Department of the United States.

Mr. Walker produced no authorization or consent from the Secretary of the Treasury for the use of the income tax returns in this suit, unless the foregoing certificate be deemed such.

It further appeared in Mr. Walker's argument that the originals of the income tax returns were brought to Grand Rapids by Mr. Kelleher, the Solicitor of Internal Revenue, who had come to Grand Rapids for the purpose of attending this suit.

During Mr. Walker's argument, the following occurred:

"The Court: If I understood your statement to the jury, made last night, the sole purpose of the introduction of these returns is with reference to their bearing upon the question as to whether there was an agreement between Mrs. Dickel on the one hand and the beneficiaries or the representative of the beneficiaries, Mr. Shwab, upon the other hand, that this trust should not take effect until the death of Mrs. Dickel.

Mr. Walker: I think so, Your Honor. In other words, that is the competent purpose, other inferences might be drawn properly or improperly, but that is the purpose, that is the material and competent purpose; I think I made that plain last night. I am of that opinion; that is my understanding.

The Court: If I understood your statement last night, although it may not have been inclusive of everything that you purposed to show, that that is the sole evidence upon which you ask to go to the jury upon that question.

Mr. Walker: No, Your Honor, I wouldn't say that. I wouldn't say that that is the sole evidence upon which we ask to go to the jury upon that question. I think

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there is other evidence in the record already bearing upon that, tending in that direction, proper to be considered; that is a very material piece of evidence as bearing upon that question, but I will not concede that it is the sole evidence."

At the conclusion of the arguments upon the motion, the Court expressed an opinion, as follows:

The Court: The whole discussion is somewhat beside the mark in this matter. If the document itself were introduced in evidence and it showed exactly what has been stated that it will show, in my judgment it would not be sufficient evidence to submit the question which is raised, sought to be submitted to the jury. The trust agreement in this case is a written instrument, involving not only the beneficiaries under the trust and the donor or the creator of the trust, but also the trustee. There is not the slightest proof that as between the actual parties to this instrument, the Detroit Trust Company and Mrs. Dickel, that it was revocable or that it was other than it purports to be, and the most that could be said in that behalf on the part of the defendant, that there was a supplementary or an additional understanding that when the moneys, the income from the trust, was paid over to the beneficiary, that he, in turn, would pay it over to the creator of the trust; that is the most that could be established.

Mr. Walker: Will your Honor pardon me one moment there? Your Honor says "additional or supplementary"; it might have been contemporaneous.

The Court: Well, contemporaneous.

Mr. Keeney: So it would be merged in the written agreement.

Mr. Walker: Not for the purposes of this—

The Court: And so far as that part is concerned, it appears that this trust was an irrevocable trust, the trust itself did not take effect at the death of Mrs. Dickel, nor the possession of the trust moneys or the income therefrom did not await the death of Mrs. Dickel, so that, at the most, the evidentiary effect of this evidence which is offered would be very remote from the issue in this case and could have no bearing upon the other issue, upon the other question which has been presented and which is claimed, but, regardless of that, I cannot agree with counsel that either the Act of Congress relative to the possession and inspection of tax returns or the regulations of the President, through the Secretary of the

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Treasury issued thereunder, were designed or intended solely for the convenience of the Treasury Department. That contention is not American; it is not in accordance with our institutions, however far we may have departed in the recent past, under the urge of extreme exigencies in the invasion of private right and the privacy of private affairs. This case does not call for it and there is no such exigency here. The Act of Congress was made as much in the interest of the taxpayer and the one who makes the return as it was to suit the convenience of a department of government and to save it from unnecessary service and labor in answering questions of curiosity. Every person, save only in his relation to the government, either State or National, has a right to have his private affairs his own affairs, and not the affairs of his neighbors or anybody else, and these regulations were issued as much to serve that purpose as they were also in the interest of the convenience of the service of a department of this government; the rights were reciprocal. Now, the Congress has specified first that these documents shall be public, but immediately placed a limitation upon the publicity of the document; placed an express and an absolute limitation, and the purpose of it is that they shall be public only so far as the public interest of the Governmental interest may require, and that they shall not invade the right of privacy of individuals beyond the necessities of the Government, and the Congress has provided and has left to the discretion of the President, acting through, as he may, the Secretary of the Treasury, who is only the hand of the President in his action, what regulations shall be made that will serve those interests.

Now, it may be that it was unnecessary to prescribe—that is, unnecessary as a legal proposition to prescribe the exact regulations which have been made, but when once they have been made and until they are abrogated or repealed, they exist and continue in force and must be complied with. Acting under the Act of Congress, the President, through the Secretary of the Treasury, has made certain regulations, and stated exactly when these returns may be used in a public way and in what manner; in some cases only upon an application being made through the Attorney-General's Office; in other cases an application made directly to the Secretary of the Treasury; in still other cases the Commissioner of Internal Revenue is authorized to use or permit the use of

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these returns and make them public. The case that we have here does not comply with any of those regulations, either as to the parties to this litigation or as to the subject-matter of the litigation, and the burden is upon the one offering the evidence to show its competency, not upon the one who is objecting to the evidence.

While there is, as we say, a general presumption that official action is regular, at the same time, when it comes to the question of the provability of a document which is made provable in a certain way, or permitted to be used for a certain purpose, then the requirements must be complied with, and the party offering them is bound to show that he has complied with those requirements before he can be permitted, and that the purpose for which they are offered is one of the purposes prescribed by the statute or the regulation, which has the effect of a statute in this case.

This case could not be brought if the United States were a party; it could not be brought. It is brought against the individual, the official, because of claimed unofficial and unauthorized action on his part, and that is all.

The United States Government has brought hundreds of cases in this court where it has been a party. If this were a suit by the United States to recover of this plaintiff as defendant, it might be an action between the defendant and the United States, but on neither side, in my judgment, is the regulation complied with, either as to the United States being a party or as to the plaintiff in this action, as executor of this will, being the party who made the return.

Mr. Walker: May I note an exception, first, to the ruling of the court that in any event the evidence offered, if offered, would be incompetent and irrelevant, and second, to the ruling that it is not properly usable for any purpose.

The Court: I think I should suggest to counsel in that regard that I did not intend to hold—if I did so hold it was inadvertent—either that the evidence proffered would be incompetent or irrelevant, but I do hold that it would not be sufficient to raise a question which would be submitted to the jury, in connection with the testimony already offered, whatever it may be. I am not disposed to grant the application of counsel in full effect as to the return of these returns or the certified copies thereof to the office where they were filed. I am not disposed to go

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to that extent. I am simply holding that they will not be admitted in evidence in this case. Nor do I wish in any way to censure counsel, or the officers of the government, for having them in their possession. I haven't any question as to the good faith of that action on the part of counsel. I don't mean to criticize or censure or otherwise in that regard. I am simply passing upon the question of the admissibility of this proof.

Mr. Walker: That is as I understood it. May I, before the jury returns, for the purpose of saving unnecessary offers in their presence, now offer these in evidence as bearing upon the question of whether this agreement should take effect in possession and enjoyment at the time of the death of Mrs. Dickel, or whether it was not, and have the ruling made and an exception on record.

The Court: The offer will be considered made and the objection thereto which has heretofore been made, or the application which has been stated may be considered as an objection and the objection sustained and an exception to the ruling of the court.

At the conclusion of the Court's opinion, the jury was recalled.

V. E. Shwab,

the plaintiff in this case, whose deposition had previously been read in evidence, came to Grand Rapids from Charlevoix, Michigan, and testified as follows:

Direct Examination.

By Mr. Keeney:

I am executor of the will of Augusta Dickel, deceased. I am the V. E. Shwab who is the plaintiff in this case. My home is Nashville, Tennessee.

The Court: I don't believe we had better go into matters that have been covered by the deposition.

Mr. Keeney: I was not going into those. I just called Mr. Shwab here because Mr. Walker had some questions to ask him. I will come right to the point.

I spend my summers, as my deposition shows, at Charlevoix. My home is in Davidson County, really. I reside in Nashville most of the time while I am there. I spent the summers for some years at Charlevoix. This season I have been in Charlevoix since the 6th of June.

"Q. We have read your deposition in this case. In order not to keep you here any longer than necessary and just by way of explanation, I wish you would tell us the condition at this time of your wife's health.

"A. Well, my wife was stricken with paralysis some years ago.

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The deposition shows that she was stricken with paralysis in May, 1914. That is as I recall it. She has never gotten over it, of course. She is better than when she was first stricken. This is the second time I have been away from her over night since she was stricken. This time I simply left my home last night and I am here this morning. When I am dismissed from the stand, I am going back there as quick as I can catch a train.

"Q. There is one point in your testimony upon the cross-examination that was not entirely clear, although I think I understand it. You were asked your cross-examination relative to the payment of the inheritance taxes in Michigan and Tennessee upon the estate of Augusta Dickel, and you gave the amounts in your deposition, paid by you as executor for the State inheritance taxes in Tennessee and in Michigan?

"A. Yes, sir.

Realty was the class of property upon which I paid the state inheritance tax in Tennessee for the Augusta Dickel estate. It was upon real property. I paid the inheritance tax in the state of Michigan for the estate of Augusta Dickel, upon the personalty, personal property, stocks, bonds and securities. That personal property upon which I paid the inheritance tax in the state of Michigan did not include the property that had been transferred by Augusta Dickel to the Detroit Trust Company, but it was upon the personal property that was left by Mrs. Dickel at her death, independent of the property which she had conveyed in 1915 to the Detroit Trust Company.

Cross-Examination.

By Mr. Walker:

It is a fact that I paid no inheritance tax whatever, to the state of Tennessee or to the state of Michigan, or any other government, upon the million dollars of bonds that have been transferred by Augusta Dickel in April, 1915, to the Detroit Trust Company. It is a fact that the only tax that has been paid upon these bonds, at least since April 21, 1915, is the one-half of one per cent. that was paid to the state of Michigan when those bonds were declared, at or about the time they were turned over to the Detroit Trust Company.

"Q. Up to that time, up to the creation of this trust instrument in April, 1915, and the turning over of this million dollars of bonds to the Detroit Trust Company under that instrument, what taxes had you for Mrs.

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Dickel or she herself directly or indirectly paid in Tennessee or anywhere else upon those bonds or holdings?

Mr. Keeney: That is objected to as immaterial, irrelevant.

The Court: You may answer.

Mr. Keeney: Note an exception.

"Q. Do you understand the question?

"A. Yes, sir.

"Q. All right.

"A. You asked me, I believe, what taxes I had paid in Tennessee upon this property?

"Q. On this million dollars of bonds for Mrs. Dickel, or for taxes she had paid, if any, up to that time.

"A. The property was carried by me jointly, for her, of course. We held everything we had jointly. Now, I didn't make any returns in Tennessee, but, as is customary there, if you don't make returns, the assessor assesses you what he thinks is right and proper.

"Q. Assessed you or Mrs. Dickel, which?

"A. Either."

I made no return for Mrs. Dickel. I don't think that she made any return to the taxing authorities of Tennessee on these bonds, this million dollars of bonds, nor did I, nor on the \$250,000 of bonds that was left, that is approximately \$250,000 of bonds that were left after she had made this trust instrument; no return had been made upon those by me or by her.

The taxing authorities of Tennessee, in the absence of such return or otherwise, had not imposed any tax, either in my name or her name upon that \$1,250,000, approximately, of bonds, up to April, 1915. I don't think I had paid a dollar of tax for her.

"Q. Directly or indirectly upon those bonds?

"A. I don't think she was ever assessed.

"Q. Neither in her own name nor in the name of George A. Dickel & Co. when they were owned jointly?

"A. Well, George A. Dickel & Co. were.

"Q. For those bonds?

"A. For whatever joint property they had.

"Q. For how much were they assessed. Was George A. Dickel & Company assessed one dollar on account of either the bonds that she held with you jointly or you with her jointly, amounting to about \$2,500,000 in April, 1915; had they been assessed in 1912, 1913, 1914 or 1915?

Mr. Keeney: I object to that as incompetent. He speaks of \$2,500,000 of bonds. I don't think that comports with the record.

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Mr. Walker: I thought it did.

"A. You mean securities, don't you?

Mr. Walker: Shall I proceed?

The Court: You may proceed.

"Q. Yes, securities; we have been calling them bonds here, I mean bonds and securities in the nature of bonds, investments.

Mr. Keeney: Do you mean to speak to him of two million and a half dollars of bonds or of bonds and stocks?

Mr. Walker: No; bonds and securities, I don't mean stocks. Just a moment, let us be clear; you say a division was made, a partial division between you and Mrs. Dickel, about the time this trust instrument was created, is that right?

"A. Yes, sir.

"Q. Of bonds and securities, there was turned over to her, that is, there was called hers one million dollars of bonds or bonds and securities that were included in the trust agreement, is that right?

"A. Approximately."

"Q. And she left about \$250,000 of similar bonds and securities besides, is that right?

"A. That is right. I don't remember the amount.

"Q. And you had at the same time about the same amount or a little more of like bonds and securities, is that right?

"A. Yes.

"Q. That is what I am talking about, about that two million, five hundred thousand?

"A. Quite a large sum of those local securities were tax free.

"Q. How much of them, what ones do you refer to.

"A. Oh, I refer to bank stock, railroad stock, Nashville & Decatur; there is one other.

"Q. So that if you made a return of those you wouldn't have had to pay any taxes on them anyway?

"A. No.

"Q. We can exclude those, there were no taxes paid or returned on those, speaking of the balance which was two million dollars or more, wasn't it, of bonds and like securities approximately?

"A. I don't think so after deducting the other.

"Q. It was considerably over a million, wasn't it?

"A. Oh, yes.

"Q. Because she had a million?

"A. Yes."

V. E. Shwab.

"Q. Had you or she ever paid a dollar of taxes upon those bonds, either while held jointly under the name of George A. Dickel & Company, or however held, or after they were divided, up to the making of this instrument?

"A. Yes, sir."

"Q. What had you paid. When?

"A. Paid the amount that we were assessed for, I can't tell you the amount now.

"Q. Were you assessed a dollar on those bonds?

"A. We were assessed on personal property.

"Q. George A. Dickel & Company were assessed, a forced assessment, that is the assessment imposed by the authorities, not upon your return of \$20,000 weren't they, for a number of years there prior to this time?

"A. Yes.

"Q. Was that on these bonds, wasn't that on the visible personal property of George A. Dickel & Company?

"A. I think not.

"Q. Didn't George A. Dickel & Company have visible personal property in their business to the amount of \$20,000 and more, tangible visible personal property?

"A. This did not include their merchandise.

"Q. Fixtures, furniture, merchandise and such things?

"A. Oh, no.

"Q. Didn't they have that?

"A. Yes, but they paid tax independent of that.

"Q. The assessment was \$20,000 whether on the bonds or on some other personal property of George A. Dickel & Company, wasn't it?

"A. Well, we paid an ad valorem tax and other tax on the stock of merchandise.

"Q. Stick now to the \$20,000 assessment, that was on either bonds or other personal property of George A. Dickel & Company, wasn't it?

"A. Yes.

"Q. That is all you paid, wasn't it, if it was on the bonds and securities, that is all you paid, wasn't it?

"A. Yes.

"Q. That was a forced assessment?

"A. Yes.

"Q. You made no return on it at all?

"A. No.

"Q. You made no return for that, either for Mrs. Dickel or for yourself or George A. Dickel & Co.?

"A. Wasn't asked to.

"Q. No you didn't.

"A. No, I didn't.

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"Q. When Mrs. Dickel died you say you paid an inheritance tax upon her personal property in Michigan, and on her real estate in Tennessee the most of the real estate that Mrs. Dickel owned in Tennessee was owned as what we call tenant in common with you, she owning an undivided half and you owning an undivided half, isn't that correct?

"A. Most of it."

"Q. Up to the amount of \$631,000 or thereabouts?

"A. Is that the total real estate?

"Q. As you value it, the total owned jointly?

"A. She and my wife owned some jointly.

"Q. I am speaking now of Mrs. Dickel, commencing here, undivided half, it says.

"A. I guess that is correct."

She owned besides that a place 441 8th Avenue and 3100 West End. She owned those two places herself on 8th Avenue.

In April, 1915, I was living in that house 3100 West End, with Mrs. Dickel and my wife, all as one family. We have been living there in that house several years; I can't remember, but back of 1912, 1913, 1914, 1915 and more. That was in the city of Nashville, Tennessee, but my home was out two miles. I always claimed my residence outside, though I lived inside and had for years.

I think, at the time of Mrs. Dickel's death, she owned of bonds and like securities, this amount that I listed here, \$234,247.00. That is what I paid the inheritance tax in the state of Michigan upon. (The witness was shown a paper.) That is my signature to this affidavit, purporting to have been sworn to on the 7th of March, 1917, before Mr. Lawrence, notary public. I made that statement in that last paragraph which you show me. I recall it. I know I made it, because I signed it. It refreshes my recollection now so I know I made it in that affidavit. Mr. Lawrence, the notary public who swore me, was my book-keeper, private secretary and confidential clerk; book-keeper for the firm, and had been for a number of years.

"Q. You say here, do you not, under date of 7th of March, 1917, "the question of taxation became more pressing with the result that I became interested in the situation in some of the eastern and northern states and explained it to Mrs. Dickel. With a view of availing ourselves of that condition, Mrs. Dickel changed her domicile to Michigan and spent a large part of her time

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there and died there." I ask you wherein and how—you are referring back to that, the time before the execution of the trust instrument and about the time she changed her domicile to Michigan, when you say the question of taxation became more pressing, 1914 and 1915?

"A. Yes.

"Q. Wherein and how did the question of taxation become more pressing so far as Mrs. Dickel was concerned or you were concerned—well, Mrs. Dickel was concerned, in 1914 or 1915, will you state?

"A. I don't know just why I used that expression, but naturally—

"Q. Who was your lawyer at that time?

Mr. Keeney: Let him finish his answer.

Mr. Walker: I beg your pardon.

"A. But naturally as time rolled on I gave that more thought, concluded to look around, and did, in many states, for a place to place that trust where it would be reasonably taxed.

"Q. Where you would get the least taxation. That is not the question I asked you. I asked you wherein in 1914 and 1915 did the question of taxation, so far as Mrs. Dickel or her property is concerned, become more pressing; she hadn't paid a dollar, had she?

"A. Only through that assessment on George A. Dickel & Company.

"Q. That assessment of \$20,000 on George A. Dickel & Company, was that pressing?

"A. Well, we couldn't hope to keep that that way always.

"Q. Was it getting more pressing, had it been increased; hadn't it run at \$20,000 for four or five years?

"A. Well, I guess not."

It is a fact that from about the time of George A. Dickel's death in 1894, up to the time of the making of this trust agreement and afterward, I had run the business; been the business head and manager and run and controlled the business of George A. Dickel & Co., and prior to that time, for many years, and that only upon the coming in of my son George, of somewhat late years, has somebody else had a part in the real management of the business. Mrs. Dickel herself entrusted it entirely to me, and had nothing to do with the management of the affairs of the business and had nothing to do with the making of investments of the surplus money or earnings of George A. Dickel & Co. in these bonds and se-

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curities and stocks, if they were stocks, that finally amounted to about \$2,500,000. That was entrusted entirely to me.

"Q. Sometimes after it was done you would speak to her about it casually, more after you wouldn't say anything about it, that is right?

A. When I did speak to her about it, she would say, "Don't tell me anything about it; do as you please." Practically half of the income on this investment, this joint investment in bonds and securities and stocks, was hers, and half was mine. I divided it and paid over to her any part of it she wanted; the balance we invested.

"Q. You collected all the income?

A. We did. It was kept together in an undivided fund, and whenever she wanted some money at the bank, I either deposited it or told the bank to honor her check. If it was an overdraft, I made it good. I was director of that bank.

"Q. You kept your deposit account and George A. Dickel & Company's deposit at that bank where she kept hers, so that the funds were either reinvested, that is, the bulk of the funds, the income from this joint investment were reinvested in new securities and bonds, all were kept in the account of George A. Dickel & Co. in the bank or in your account in some form, is that right?

A. In my account in some form.

"Q. Not divided and paid over to her?

A. No.

"Q. It appears that you received in 1915, eighteen thousand and some odd dollars from the Detroit Trust Company as the income upon this trust fund, do you remember that?

A. What year?

"Q. 1915, the remainder of the year, and it appears that you received in 1916, that year, something in the neighborhood of \$47,000 or \$50,000 of income on this trust fund; is that about as you remember it?

A. Practically.

"Q. From the time the trust instrument was made in April, 1915, or the securities delivered in June, I guess they were, because they were formally acknowledged June, 1915, up to Mrs. Dickel's death in September, 1916, where had you kept the income that you received from the Detroit Trust Company, where did you put it?

Mr. Keeney: That is objected to as immaterial and irrelevant.

The Court: I think you may answer.

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Mr. Keeney: Note an exception.

"Q. Where did you put it, where had you kept in when you received it, what did you do with it?"

"A. I deposited it there, in the bank there at home.

"Q. Just the same as you had the income from the joint investments, to Mrs. Dickel and Mr. Shwab, or George A. Dickel & Co., is that right? Or did you keep it separate by itself somewhere?"

"A. Oh, no."

Whatever I received from there I deposited to the account. I said in my deposition that there was a division to the extent of a million dollars on each side, of the bonds and securities of George A. Dickel & Co. shortly before the trust agreement was made, by which a million became Mrs. Dickel's separate property and a million to offset that, of similar securities, of stocks or otherwise, became mine. There wasn't any division made of the remainder until after her death. That is the \$500,000 odd of bonds and securities of which Mrs. Dickel died possessed of \$234,000 odd. I then divided them as her executor between myself as executor and myself as an individual. It came to me under the will, but for the purposes of taxation return, I had to make some apportionment. The income from these about \$500,000 of bonds and securities and investments that remained undivided after the trust agreement was made and up to the time of Mrs. Dickel's death, I reinvested that just as I did everything else, in securities of some kind; in real estate; I can't tell you. I overlooked one fact that she mentioned; I don't remember the year. I bought a piece of property jointly, for her and me, of \$265,000. That was some of this real estate.

"Q. I am speaking now of what took place between June or April, 1915, when the agreement was executed, and her death. Is it not a fact that the income, the interest and income from these bonds and other securities, \$500,000, approximately, that you and she still owned jointly, was collected by you after the trust agreement was made and up to the time of her death, was put in the same account as the income you received from the Detroit Trust Company precisely, isn't that the fact?"

Mr. Keeney: That is objected to as immaterial.

The Court: He may answer.

Mr. Keeney: Note an exception.

"A. My bookkeeper kept a complete record of that, kept books to show how much each one was entitled to out of that."

V. E. Shwab.

I am sure of that. I remember Mr. Geer, this gentleman here, who came to see me. I don't think he asked me if I kept these records and asked to see those records. I told him Mr. Lawrence kept the books at Louisville, and Mr. Lawrence would show them to him.

"Q. Didn't he find out afterwards that Mr. Lawrence didn't have any of those records, didn't he tell you they had all been destroyed or lost in moving and he hadn't any of them and couldn't show them to Mr. Geer?"

"A. Not all of the records; some of the records.

"Q. I mean any of the records—

"A. What year are you talking about?"

"Q. The records between you and Mrs. Dickel.

"A. Up to what time?"

"Q. I am talking about the time when Mr. Geer came to see you and wanted to see the records and you referred him to Mr. Lawrence.

"A. I guess this year—our books were moved from Nashville to Louisville in 1917, and after Mrs. Dickel's death we opened new books.

"Q. But prior to that time the records were kept correctly?"

"A. And that book, the old book, was perhaps mislaid or lost, or packed up.

"Q. In that old book mislaid or lost, whichever it may be, in that old book prior to Mrs. Dickel's death, do you know whether any entry was made or not, dividing the income that you collected either on the bonds or from any other source that belonged jointly to you and Mrs. Dickel, the real estate and the bonds, were they kept separate or were they all kept together in the same account and put in the bank and in the same account, that is what I want to know?"

"A. They were put in the bank in the same account, but the bookkeeper was an honest man; kept a complete record of every dollar received and disbursed."

He divided them between me and Mrs. Dickel; kept an account with each. I saw the joint account; that is where he kept it. Not the joint account of George A. Dickel & Co., that was a merchandise business. This George A. Dickel & Co. was originally Mrs. Dickel and myself; that account was continued. They were kept in my joint account on the books. It might have been in the name of George A. Dickel & Co. or V. E. Shwab, trustee, I have forgotten. I know it was kept both ways for a long time. We kept a separate bank account for the firm. Our bank account and the firm's were separate.

V. E. Shwab.

I mean the merchandise firm. There was a George A. Dickel bank account and a Victor E. Shwab bank account, and there was an Augusta Dickel bank account and a V. E. Shwab, trustee, bank account for a number of years before and after the trust instrument was made. To discriminate those accounts, I kept a George A. Dickel & Company, Trustee, account. That was for Mrs. Dickel and myself after we wound up the George A. Dickel & Co. We didn't want to have two George A. Dickel & Co. accounts. I kept an account, a V. E. Shwab personal account and Mrs. Dickel's personal account. Both her and my personal account were very small. Did not touch this income on the bonds and securities.

"The Court: Let me see if I understand it. I think I do. What you did, you kept an account in the bank, George A. Dickel & Co., and that was your business account?"

"A. Yes; mercantile business.

"The Court: And your investment account, if it may be called that, which was a joint account between you and Mrs. Dickel, you kept in your name as trustee?"

"A. Yes, sir.

"The Court: And that was for the purpose of distinguishing your business account from your investment account?"

"A. From our personal account.

"The Court: You kept a personal account besides?"

"A. Yes."

All the income from securities and rentals went into the V. E. Shwab, trustee, account, both before and after the trust agreement was made. I mean including the trust, of course.

This trust agreement that was executed in April, 1915, by Mrs. Dickel was not the first trust agreement that was drawn by Mr. Vertrees for me or under my direction. There had been one drawn before, in 1913 or 1914; I have forgotten. I recall that there was a letter from Mr. Vertrees to me upon that subject just before he went South and while I was at Charlevoix. I think that trust agreement was executed by Mrs. Dickel, signed and executed by her. I don't mean that it became final and was delivered, but it was signed and executed by her. I cannot say positively. Mr. Vertrees so states; I think there at Nashville. I was there when she executed it, if it was done before June. I cannot recall whether I saw the trust agreement after it was executed by her. I must have seen it in the form it was drawn up, either shortly

V. E. Shwab.

before or shortly after it was executed by her. I don't recall it.

I cannot remember whether that trust agreement made George Shwab one of the trustees besides the Trust Company. It passed from my mind because it was never executed. As to whether it was finally torn up, I remember very little about it.

"Q. You do recall, do you not, though, that under that trust agreement, Mrs. Dickel reserved the income of this trust fund, this million dollars of bonds that she was turning over, to herself for her lifetime, that she was to have the income for her lifetime, you recall that, don't you?

Mr. Keeney: Objected to as immaterial.

The Court: He may answer.

Mr. Keeney: Note an exception.

"Q. Do you recall that fact?

"A. I recall that because Mr. Vertrees stated it to me, whether I read it or not I don't recall."

"Q. At whose direction, if you know, was that provision struck out or changed, so that it was left out in this 1915 trust agreement, so that the income was to come to you instead of going to her, at whose direction?

"A. It must have been upon her direction, she could do as she pleased about it.

"Q. Do you recall it?

"A. I don't.

"Q. Did you hear her make any suggestion?

"A. I may have talked to her about it at the time but I have forgotten.

"Q. Have you any recollection of talking to her about it at the time?

"A. That particular trust?

"Q. That particular item of the trust?

"A. No, I haven't."

At that time, my wife was believed to be on her death-bed. I gave those things very little thought or consideration, and if they came up, it passed out of my mind. At or about the time these three wills were made, my wife was believed to be on her death bed and it was on her account they were made.

"Q. I understand the testimony; did you talk with her or didn't you, with Mrs. Dickel about it, and if you did, what did you say, have you any recollection of it?

"A. I have not.

"Q. Did you talk with Mr. Vertrees about it?

"A. The chances are I talked with them both, because

V. E. Shwab.

Mrs. Dickel would hardly make a move without consulting me, and Mr. Vertrees has been my personal friend and attorney for many years."

"Q. Who gave the directions to Mr. Vertrees in the first instance for the drafting of the first trust agreement; you did, didn't you?

"A. If I did it was under her instructions.

"Q. Who gave the instructions to him for the drafting of the last trust agreement? You did, didn't you?

"A. Possibly I did, but if I did I was so instructed by Mrs. Dickel.

"Q. Did you ever take it out and read it over to her, either one of them?

"A. Oh, yes, she read it.

"Q. Did you read it over to her, either one of them, or take it out to her?

"A. I don't recollect taking it out, but I am satisfied it was taken out and read by her.

"Q. Who did it?

"A. I may have done it or someone else.

"Q. Did you do it?

"A. I can't say yes or no, I know either I or someone else did.

"Q. Did anybody else do it to your knowledge?

"A. Certainly somebody else did.

"Q. Did anybody do it to your knowledge and if so, who?

"A. Well, there was three or four possibly might have taken it out, my son, my bookkeeper or myself, or perhaps Mr. Vertrees.

"Q. I did not ask you who might, who did do it to your knowledge?

"A. I don't know, I can't answer that, I can't recall that."

Mr. Lawrence is living. The last I heard of him he was on his way back from California. He had a nervous breakdown some three or four months ago. He is still in my employ. I think perhaps he was in Louisville in April, when my deposition was taken before Mr. Duke. He was down to make out a contract, but he was in very bad health.

"Q. Do you recall making a return of income tax as agent for Mrs. Shwab or agent for Mrs. Dickel for the year ending December 31st, 1915, the year this trust agreement was made?

Mr. Keeney: That is objected to as immaterial.

The Court: You may answer.

V. E. Shwab.

"Q. Do you recall that?"

"A. Yes, sir.

"Q. Do you recall that you included in that return as a part of her income the sum of eighteen thousand and some odd dollars, being the total amount that you had received from the Detroit Trust Company?"

"A. Yes, sir.

"Q. Up to that time, as the income upon these bonds, do you recall that?"

Mr. Keeney: Objected to as incompetent, immaterial and irrelevant.

The Court: He may answer.

Mr. Keeney: Note an exception.

"A. I recall that, yes, sir, my attention was called to it by Mr. Lawrence later on."

I did that. Mr. Lawrence prepared the income tax returns for me; all of them I have ever made, every one. After it was done some time, he claimed that I had done it. I denied it. When we looked into it, he convinced me he was right and I was wrong. I did not look that return over before I signed it and swore to it, to see if it was correct; only as to the amount, I usually signed them. I took it on faith; I never made out one in my life; I could not make it out. I did not examine the figures; not the amount. I may have seen there that it said eighteen thousand and some odd dollars received from Detroit Trust Company.

Mr. Lawrence was one of our bookkeepers; we had three. He knew where this money came from. I think he knew about the execution of this trust agreement at the time; I know so. I sought to amend or correct that return after I discovered—after Mr. Lawrence told me this. I had him or my son-in-law, Vice-President of the bank, go to the Collector of Internal Revenue and tell them about that return having been made that way and tell him we wanted it corrected. I did not do it myself. I know what they replied to me. Paul Davis is the son-in-law, Vice President of the American National Bank.

Redirect Examination.

By Mr. Keeney:

In Mrs. Dickel's lifetime there were four of these bank accounts to which I have referred, including the firm account. One of them was the account of George A. Dickel & Company, another the account of V. E. Shwab, Trustee, the third was V. E. Shwab's personal account and the fourth Augusta Dickel's personal account. These personal accounts were comparatively small in amount;

V. E. Shwab.

very inactive. Mrs. Dickel's personal account was money that I would deposit from time to time, usually deposited it to her credit for her checking account, for her to check on, and the bank also had instructions when there was no balance to her credit, to honor her checks for any amount.

My personal account was not an account in which I kept sufficient money to meet my checks. It was very small; not for personal expenditures and the like. I checked very little on that account. It was more on the other account. The moneys that came in by way of income upon securities usually went into the V. E. Shwab, Trustee, account, so that the moneys were deposited in bank to that account. I certainly relied upon my bookkeeper, as these moneys came in from the different investments, to make credit of these items to the proper parties. The bookkeeper would make the proper credits, either to myself or to Mrs. Dickel or as the facts might warrant. Then, as moneys were checked out of that account, for the purpose of reinvestment or otherwise, as to the moneys so withdrawn, I relied upon my bookkeeper to make debits of those items to the proper parties. The first time my attention was called to whether I did not include in my 1915 income tax return certain moneys that came in by way of income upon the securities in the hands of the Detroit Trust Company, was several months ago, and it passed out of my mind, and then when Mr. Lawrence was there the last time, perhaps before he went away sick, he reminded me of it and I looked into it and found he was correct. I never could understand why that was done. Mrs. Dickel and I—she could at any time have gotten any amount from me she wanted, or I could from her. She was more like a mother than a sister-in-law. There were just the three of us, she and my wife and myself. I don't know how that error occurred. I have studied and thought, but I can't understand why it was done. That related simply to the income from those securities for that period in 1915, when the Detroit Trust Company had it for that year, and not to any other period. When I ascertained that this return had been made in that form, a computation was made by me to ascertain what, if any, difference that made in the amount of the tax which should have been paid by me or by me and Mrs. Dickel to the Government. That was one of the channels in which my mind ran, to know if that had been done on account of any income tax, so we figured it out. I knew it could

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not have been done so far as I was concerned, so we figured out what difference it would have made on my return if that amount had gone to my credit instead of hers. I had my bookkeeper do that. I say we did—I didn't have anything to do with it except to get him to do it, and it made a difference, as we figured, of about \$41 or \$42 in my favor against the Government. Then I sent to the Collector to correct it; I sent to the Collector to have it corrected. I never did prepare any of these income tax returns myself at any time. I have relied on Mr. Lawrence for that for years and years, as long as there has been an income tax.

Mrs. Dickel and myself owned certain real estate at Nashville, and upon the real estate we paid taxes upon the valuations that were imposed upon the property by the assessing officer. There was also a tax upon the stock of goods of the firm, and we paid that tax.

"Q. In addition to that, Mr. Walker has asked you whether you paid certain other taxes or whether you made return; I ask you what is the custom in Tennessee at Nashville, at or near Nashville, where you reside, relative to the rendition of these returns by the taxpayers, is it customary for the taxpayer to make these returns?"

"A. No, sir; it is not."

Mr. Walker: I object to what the custom is.

The Court: Of course, this whole matter of local taxation is largely a collateral issue. I think he is entitled to any explanation that may be made."

I will answer that by saying I know my associates there, most of them are men of means, and they never returned their property, but allowed the Assessor to assess it. I think the Assessor will tell you that himself. If the taxpayer does not make a return, the Assessor puts down some valuation for personal property tax against the taxpayer and the taxes are extended upon the valuation so reached. The Assessor sends you a notice to that effect, that your assessment, unless made at such and such a date, he would make the assessment. I have received written notices enclosing the slip I tell you about, asking you to make the returns, notice for your returns to be made on, and accompanying that is a slip which states that unless made by such and such a date you would be assessed by the Assessor. Slips of that kind come with your notice of assessment, by mail. I think you have one. (Witness was shown a paper.) That is the form of notice that it has been customary for the Assessor to send out to taxpayers.

Hume Jones.

The above mentioned notice was introduced in evidence and marked Exhibit "X" and read in evidence.

"Q. Mr. Walker asked you upon your cross-examination in what respect this question of taxation became more pressing as stated in this affidavit that was made by you before the Department. I will ask you whether in or about 1914 or 1915 you began to fear that these assessments in a somewhat nominal amount upon personal property might not always remain at so low a figure?"

"A. That is true, of course, and in addition to that the tax was gradually being increased in the State and has been ever since; what I meant by that, at the time it was written and signed, perhaps either one of those things, I can't say, it may have been increased taxation or it may have been that I feared further pressing by the Assessors of making me pay more taxes."

I recall approximately how heavy the rate of taxation upon personal property is for each \$100 of the assessment at Nashville. I understand you mean for State, County and corporation. It would be for the County, I cannot separate them, about \$2.85 a hundred, by the State and County and corporation, most of my personal property was paid in the County and not in the City; it was probably \$1.50 for the County and \$1.50 for the City; I can't tell you exactly. The Assessor can tell you; he is right over there. I was informed at that time, when this question came up for discussion, as to this statute in Michigan that exempted securities from taxation upon the making of one payment of one-half of one per cent. I was informed because I wrote different states to get that information.

Hume Jones,

being duly sworn as a witness in behalf of the defendant, testified as follows:

Direct Examination.

By Mr. Walker:

I live at Nashville, Tennessee. Davidson County is the County where Nashville is located. In that county I hold the official position of Chief Deputy in the County Tax Assessor's office. My duties are to run the office. The job in the office is assessing taxes for the County, State and County taxes. I know Mr. V. E. Shwab. I knew of Mrs. Augusta Dickel, the partner. I knew of the firm of George A. Dickel & Co. I am the state and county assessing officer. The city also has an assessing

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office or board. The County assesses the state and county taxes. The state and county assessors assess the ward tax and the district tax. The city assessors assess the ward taxes. The city assessors assess the city taxes in wards. The county assessor assess the state and county taxes for the wards and districts—two assessors. He makes a valuation and an assessment for the purposes of levying a state and county tax. Of course it includes all the property in the wards in the city. The city assessor makes a valuation and assessment for the purpose of levying and having collected the city taxes. That is an independent and separate assessment by another officer. There is such a term that we used as "forced assessment." Our schedules are mailed out on the 10th of January each year, with this notice in them. That notice which you show me (Exhibit "X") accompanies the schedule on the 10th of January to corporations and individuals. Such were mailed to V. E. Shwab, but not to George A. Dickel & Co.

Mr. Walker had a tax schedule marked Exhibit "1."

That is the form of the tax schedule that is mailed with that notice to individuals, the notice and tax schedule mailed out on the 10th of January, including V. E. Shwab. It was not returned in the case of Mr. Shwab. If not returned by April 20th, we have a right to force them, corporations. Individuals, by the 20th of May. A notice is sent out of the so-called forced assessment.

Mr. Walker: I will ask to have this bunch, this collection of seven printed notices, I take it they are marked as an exhibit; I will ask you to identify them in a moment and then I will show them to you, Mr. Keeney. (Marked Exhibit "2.")

With the exception of the year 1915, these are the originals of the notices of which duplicates were sent. These were the originals, and duplicates were sent. These are the originals of the notices, duplicates of which were sent to V. E. Shwab as the so-called forced assessment for the years therein named. As to the year 1915, the record was misplaced in the office. This is a copy. The 1914 was made by the assessors, you notice there, which is practically the same as a forced notice, because unsigned by Mr. Shwab. The 1915 notice would be like these and the amount would be the same as this, as the amount that was running at that time. As to the 1914—the 21,000, that is one exemption by law; 20,000, that was

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made by the assessor, signed by the assessor on the form of the schedule not signed by Mr. Shwab.

Mr. Walker: Now, I offer those in evidence, including this so-called—the schedules have been marked Exhibit 1, Exhibit 2.

Mr. Keeney: Objected to as immaterial and irrelevant.

The Court: I suppose this is offered upon the theory that it tends to rebut the claim of the plaintiff that the trust which was created was created partially because of taxation?

Mr. Walker: I use the word primarily instead of partially and then say it is absolutely, that is the purpose of the offer.

The Court: It will be received.

Mr. Keeney: It doesn't in any way tend to dispute the fact that such a conveyance was actually made.

Mr. Walker: The purpose of it is the material thing here, as we look at it, why was it made when it was made, bearing upon the—

The Court: It will be received for what it is worth upon that question.

Mr. Keeney: Note an exception, and may that stand as to this class of testimony?

The Court: Yes, it may stand to that class of testimony.

(Exhibits "1" and "2" were read in part by Mr. Walker.)

Question by Mr. Keeney:

"Q. Have you any personal knowledge as to the sending out of these notices, or as to what was done prior to 1913?

"A. No, sir; only the records.

I find these records in my office, the practice in which was the same then as now, to send out duplicates and keep the original. J. L. Gillan was Chief Deputy under Mr. Binns. That is his signature upon these notices and his writing, Mr. V. E. Shwab. The law provides for certain exemptions; you will see it on that. It provides for a fixed sum of \$1,000. It is on the original schedule there, right at the bottom. That was the amount allowed by law. Those are all notices to Mr. E. V. Shwab. No notices were sent to Mrs. Augusta Dickel or Mr. Shwab as her agent. The assessments based upon these notices are on our books and they appear upon our books for those years. I mean Mr. Shwab, individually, is the

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only one that appears on our books. He appears as those notices call for 1910 on up to the present. 1910 on up he appears assessed upon our books as personalty for the amounts named in these notices. No changes. He paid taxes for those years to the County of Davidson on personalty to the amounts shown on these written notices. No other amounts on individual personalty. I knew Mr. Shwab had some rent notes outside of bonds, stocks and other securities. I knew whether he had automobiles or not. I knew whether he had household furniture, jewelry, watches, plate, etc. This bracket means taking items, any or all items shown on the personal assessment.

Mrs. Augusta Dickel did not make any return for those years, nor was any notice of forced assessment sent to her.

"Q. Or was she assessed anything?"

"A. Her name does not appear on the book.

"Q. For any of those years, to the County of Davidson, for State or County taxes?"

"A. For nine years."

The assessment of George A. Dickel & Co. is not shown on our books. They had nothing much that we could assess that I know of. The reason for that is that we assess only personalty and realty. We don't make any ad valorem assessment of stock in trade. The city and county clerk do that; not the county assessor, the county clerk for Davidson County. He makes the assessment for revenue ad valorem, merchant tax; not the general property tax. I am assessing the general property tax upon the basis of personalty and valuation. These are the only assessments we have for those years against V. E. Shwab, and none against Augusta Dickel, directly or indirectly, and none against George A. Dickel & Co. for personalty. For realty we have.

Cross-Examination.

Mr. Keeney:

I have been the Chief Deputy County Assessor since January 1, 1913. I assess the state and county taxes. We assess the realty and personalty concerning the state and county taxes, but not anything else. We have nothing to do with the city tax. We assess the wards, the same as the city assessor, but the offices are two entirely separate organizations. The city assessors assess the wards, and so does the county assess them; that is, property in the wards. We assess the property in the re-

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spective wards, but we do not assess any property than either real or personal, except for the purpose of making the levy of the state and county taxes, and the city taxes then are based upon assessments that are made by the City Assessor, and not by us.

I identified this morning this Exhibit "X" as a form of notice that I think I said I sent to Mr. Shwab and other taxpayers. We sent out the notices in substantially that form each year since I have been Chief Deputy County Assessor; mailed them on the 15th of January. The books will show how many of these notices I mailed out each year. I guess all together both districts and wards property, fifteen or eighteen hundred; maybe a few more. I am not in shape to answer how many taxpayers there are in Davidson County. As to approximately how many names appear upon our tax-rolls in Davidson County, as being the persons assessed in respect of personalty and realty. Mr. Bell, the trustee, there, could tell you. The big books that are made out for the trustee are made out under the supervision of the County Clerk from the books in our office, from the records in our office. He could tell you approximately. I don't recall it. It would be an amount several times this fifteen or eighteen hundred names that I mention. Many times that.

"Q. So that the fact as I get it is this; that out of the persons, the many thousands of persons whose names appear upon your tax rolls, you selected some say 15 or 18 hundred in number and you sent to them this request that they fill out and return and send in returns of personal property for taxation?

"A. Yes, sir."

As a result of sending out these fifteen or eighteen hundred requests or demands each year for returns of personal property for taxation, I should think not more than one-third are received from the taxpayers to whom we addressed and sent these notices. The balance are forced. One-third may be a large estimate. I would think it possible that we received from the taxpayers to whom these are sent as many as five or six hundred returns; approximately that. As to the other two-thirds then, to whom we sent these notices, the assessment is a forced assessment. I mean by that that not receiving the return from the taxpayer, we put down the taxpayer upon our roll at whatever we think proper. That valuation which we set down as the forced assessment goes before the County Board of Equalization, in June. They

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pass on it. That is final. It is true that among those who are deemed men of wealth there, possessed of securities like notes and bonds, we don't get very many returns. If a man makes a return, we put him down for what he returns.

"Q. So that if Mr. Shwab, for example, getting this request or demand for a return of personal property for taxation from you, had returned, either for himself or for Mrs. Dickel, or for George A. Dickel & Company, that he or they had a million dollars of personal securities, he or they would have gone down on the roll for a million dollars personal property assessment?"

"A. I should have reported, it was unbeknown to be. I never knew of his owning these bonds until thirty days ago; never heard of it at least."

If the return had been made, showing, say a million dollars, the assessment would have been a million dollars, less a thousand exemption by law. The rate, approximately, of taxation which has prevailed for our state and county taxes in these years since I have been Chief Deputy County Tax Assessor has been as follows: The rate in the city in 1918 was \$1.50, the state and county rate, and in 1917 it was \$1.40, and in 1916, it was \$1.35, I think, I am not certain; and in 1915, somewhere around \$1.30, I think. I know it has been raised gradually every year we have been in there, by the County Court, so that the rate of taxation has shown a tendency to increase in each year since I have been in this office. The rate of taxation that has prevailed in the City of Nashville for city taxes has been about \$1.50. Last year there was a special levy of two mills, it was \$1.70.

That made the total tax, state, county and city, \$3.20. Upon that basis, if a taxpayer in Nashville returns for taxation a million dollars' worth of personal property, the amount of tax, as a matter of computation, would be \$32,000, and that is for one year.

Mr. Walker: For 1918.

In the case, therefore, of a man who held, say securities like a 5 per cent. bond, the bond yielding 5 per cent. upon the par value, the tax so levied would take $3\frac{2}{10}$ per cent. out of the 5 per cent. interest upon the security. Tennessee does not have any such law as that which prevails in Michigan, whereby you can qualify securities such as bonds secured by mortgage and exempt them from taxation upon paying the one tax of one-half of one per cent. to exempt them for all time. We don't

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have any such law and never have had such a law in Tennessee, that I recall. Stocks in corporations are not subject to like taxation at the rate at which bonds secured by mortgage would be taxed. They are taxable at the same rate as personalty and realty. Taking, for instance, the case of a corporation that is organized under our Tennessee laws, like a street railway company, a street railway company would pay the taxes upon its property at Nashville, assessed by the State Board; paid through the Trustee's office. The corporation having once paid the taxes upon all of the properties owned by it, the owner of stock in that corporation would not be assessed upon his stock in a corporation. So that in a case like that, the tax is paid by the corporation itself, at its source, and a stockholder does not pay any additional tax, that is payment at the source, as we call it. That same payment at the source prevails as to stocks of railroad companies, and in reference to banks, also. Those taxes are all paid at the source and there is no additional tax at all upon the stock itself.

Redirect Examination.

By Mr. Walker:

From 1913, when I went upon the duties of this office that I now hold, I did not know, and, so far as I know, no one in our office knew of this holding of a million dollars or more of bonds and securities belonging to Augusta Dickel, either jointly with Mr. Shwab or separately. I never heard of it, or of a like holding of bonds and other securities, including perhaps some stocks on the part of Mr. Shwab, whether jointly with Mrs. Dickel or otherwise.

"Q. What is the fact then as to whether so far as the county assessor's office, of which you are a part, is concerned, since you came into the office, they have been attempting or threatening or intending, purposing, to increase the assessment of Victor E. Shwab or of Augusta Dickel, because of these bonds?

"A. Well, I never heard of any bonds at all until—

"Q. Whether that has been under consideration, increasing—

"A. No, sir.

"Q. The assessment for taxes?

"A. No, sir."

So far as I knew, there was not any matter of pressing taxation under the County Assessor's office and for the state and county taxes, State of Tennessee, Davidson

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county, so far as this large amount of bonds and securities are concerned.

"Q. There was, you say, for some years an increase of five per cent., of five cents upon a thousand?

"A. Yes, sir.

"Q. In the tax rate?

"A. Yes, sir.

"The Court: Five cents on a hundred.

"Q. Five cents on a hundred.

"A. From a mill to a mill and a half.

"Q. Since you came into the office?

"A. Gradually up.

"Q. Five cents on five mills, five cents on a thousand.

"Q. It would be from a dollar to a dollar and a half a thousand.

"Q. The increase has been five cents a year, of course.

"A. Yes, sir; I believe it was."

Under the laws of Tennessee, it is made the duty of the taxpayer to fill out this schedule and make this return when called upon, and sent to him.

"Q. And is there a penalty that may be prosecuted for, to recover if he fails to do it?

"A. I don't think—

"Q. Section 79 A2 (reads): Here is an item on the blank here, it says you cannot recover by law certain items that are not listed there, that item 1. (Mr. Walker reads item): He has to return that for the first item, that is one of the items included in this lump sum of \$21,000 assessment?

"A. Yes, sir."

I am not able to state whether this \$20,000 net assessment for the years 1913-1916, the \$19,000 net assessment for the years 1910-1913, either one of those included any amount or any assessment, any value of any bonds or invested securities of Victor E. Shwab. I am not in position to say that. I never heard of any such holding. I know where Mr. Shwab lives. He maintains his home there, a pretty nice home. I have never been in the house, but it is an expensive place, a place worth \$35,000 or \$40,000, in keeping with a man of his means. I know this place outside of the city that he spoke of, in the twelfth district, where he said he resided or called his residence. It is listed as the Dickel estate. There are two houses, I think, on a ten acre tract, out in the country. I should judge he has been living in the city limits twelve or fifteen years; not in this same house. He has changed

A. D. Bell.

from one ward to another. He used to live on Broad street, in the 11th ward.

"Q. In whose residence on Broad street in the 11th ward?"

The Court: It seems to me we are going into details here unnecessarily and getting a long, long ways from the issue.

Mr. Walker: We didn't bring this issue in, Your Honor; the other side brought in the issue of taxation.

The Court: I have permitted you to go a long ways.

Mr. Walker: I thought the question was proper. That is all.

Recross Examination.

By Mr. Keeney:

Since I have been there, I have not had under consideration any question of the increase of the personal property assessment upon either Mrs. Dickel or Mr. Shwab. If I had known Mrs. Dickel held these bonds, I would have increased the assessment accordingly on what she returned or on my judgment of what she had, so that if my judgment had been that she held a large quantity of bonds, then those would go down upon the rolls, but under the system of ad valorem taxation as it prevailed there at Nashville, most such holdings as those of notes and bonds do not get down on the roll, no return being made. That is a fact. That has been the case as long as I have been familiar with the records of the County Assessor's office. At the same time, the taxpayer, under that system, if it comes to the knowledge of the assessing officer, takes a chance of the back tax man. I would say sometimes that is an annoying circumstance.

Redirect Examination.

By Mr. Walker:

Mr. Shwab has never been annoyed that way that I know of, or Mrs. Dickel. If it had come to my knowledge that they did possess this large amount of bonds, I would have put it upon the assessment roll. I would have done that because it would have been my duty under the laws of Tennessee, and they would have been taxable under the laws of Tennessee, and for no other reason.

A. D. Bell,

being duly sworn as a witness in behalf of defendant, testified as follows:

Direct Examination.

By Mr. Walker:

I am State and County Tax Collector of Davidson

A. D. Bell.

County, Tennessee. I have here something which shows the amount of which taxes have been collected either from Augusta Dickel or George A. Dickel & Co. or V. E. Shwab, the years 1912 to 1916, inclusive. (Paper produced.) Both realty and personalty. This is for State and County taxes. I did not collect this tax myself; I was not Trustee; I was deputy in the office from 1914 on up until 1918. I was deputy in the office of Mr. Wilson. I was in the office and collected them and had to do with the collecting of them. In 1918 I was trustee lots.

"Q. What taxes did Augusta Dickel pay on personalty during those years?

Mr. Keeney: That is objected to as immaterial and irrelevant and incompetent.

The Court: You may answer.

Mr. Keeney: Note an exception. May that stand for this line of testimony?

"A. For what year was that?

"Q. 1912 to 1916, inclusive.

"A. Augusta Dickel has no personalty assessed to her for either year.

"Q. Didn't pay any?

"A. Didn't collect any."

Victor E. Shwab in the year 1912 paid taxes upon personalty on a valuation of \$19,000. I will just have to figure out what he paid, state and county. I extended the whole assessment like it was on the book. I can figure it out for you, sir, in a few minutes. He paid on a valuation of \$19,000, on a tax rate of about \$1.30. In 1912, George A. Dickel & Co. did not pay on any personalty.

"Q. 1913?"

The Court: Really, isn't this all included in the testimony of the other witness, that there wasn't any assessment and there wasn't any tax?

Mr. Walker: Very well.

The Court: The other witness has stated the rate of taxation and stated the amount of the assessment.

Mr. Walker: I am not sure it was included clearly as far as George A. Dickel & Co. were concerned. I will ask this, if I may, did George A. Dickel & Co. pay any State and County taxes for any of those years, upon personalty?

"A. No, sir.

"Q. And the amounts that Mr. Shwab paid for personalty, were those \$19,000 and \$20,000 assessments, respectively?

Vernon H. Sharp.

"A. Correct.

"Q. And Mrs. Dickel nothing?

"A. Nothing."

Vernon H. Sharp,

being duly sworn as a witness for defendant, testified as follows:

Direct Examination.

By Mr. Walker:

I live in the city of Nashville. I am City Tax Assessor. That is for real and personal and also the various merchants, their stock of merchandise, fixtures and equipment, etc., for city tax alone. The tax upon stocks of goods, that is on a separate basis. That is what we term as a merchant's ad valorem. That goes on the general tax roll and the same rate applies to that as does to other taxes.

I have been in that office since October, 1915. I have examined tax records in that office from the years 1912 to 1916, with reference to V. E. Shwab and Augusta Dickel and George A. Dickel & Co. and I have a memorandum here with me of the personalty assessment, taken from the records. I did not bring any records with me. I brought a certificate or two. I think I am prepared to answer. (Paper produced.)

"Q. I will ask you what personalty—I will ask you first was Augusta Dickel assessed any personalty during any of those years 1912 to 1916, upon the city tax rolls or assessment rolls of the city of Nashville?

Mr. Keeney: Objected to as immaterial, irrelevant and incompetent.

The Court: To what extent does your objection of incompetency go?

Mr. Keeney: I suppose the rolls themselves would be the best evidence.

Mr. Walker: I don't think that is so as to what does not appear upon the rolls. It is a negative fact.

The Court: You may answer as to that.

Mr. Keeney: Note an exception.

"A. State your question again.

"Q. Read the question, please. (Question read.)

"A. She was not.

"Q. Were George A. Dickel & Co. assessed any personalty on those rolls for those years other than the ad valorem assessment on account of their stock in trade?

"A. They were not.

"Q. Merchants' stock?"

Mr. Keeney: The same objection; irrelevant, imma-

Vernon H. Sharp.

terial and incompetent with reference to this testimony given by the witness as to assessments upon Augusta Dickel, Your Honor will bear in mind that Mrs. Dickel, in 1914, changed her residence to Charlevoix.

Mr. Walker: I included from 1912 to 1916.

Mr. Keeney: That during a large part of this time she was not a resident of Nashville at all; no reason why her name should appear there.

The Court: Of course that is true.

Mr. Walker: What did Your Honor say?

The Court: I say that would be true, if she was not a resident there, she would not be taxable there on personal property.

Mr. Walker: Of course that is a matter, I take it, for the jury to consider, and the material time I am talking about is the time when these taxes are said to be pressing which was before she changed her residence.

The Court: You will have to confine your question within the limits of the time that she was a resident there.

Mr. Walker: I don't understand where I am at.

The Court: So far, the proof shows that Mrs. Dickel moved to Michigan and lived in Michigan.

Mr. Walker: Shortly before the trust agreement was made.

The Court: In 1914.

Mr. Keeney: Changed her residence in February of 1914.

"Q. Was she on the assessment rolls for 1912 or 1913?

"A. She was not.

"Q. Or 1914, I will ask that.

"A. She was not.

Mr. Keeney: That is under the same objection.

The Court: Yes.

"Q. Or 1914?"

The Court: He may answer.

"A. She was not.

"Q. Now, to return to the question I asked, were George A. Dickel & Co. assessed any personalty upon the assessment rolls of the city of Nashville from 1912 to 1916, inclusive, other than what is called the ad valorem assessment for the merchant stock?"

Mr. Keeney: Objected to as immaterial, irrelevant and incompetent.

The Court: You may answer.

Mr. Keeney: Note an exception.

"A. They were not.

Vernon H. Sharp.

"Q. Was Victor E. Shwab assessed upon the assessment rolls for those years for personalty?"

Mr. Keeney: The same objection.

"A. He was.

"Q. How much?

"A. Twenty-five thousand—

Mr. Keeney: The same objection.

The Court: Just a moment.

"Q. Have you here a certified statement of the amount?

"A. Yes, sir.

"Q. Under the seal of the office?

"A. Yes, sir.

"Q. Taken from the records?

"A. Yes, sir."

Mr. Walker: I think that is competent, Your Honor.

The Court: I don't think that would make it competent.

Mr. Walker: Those records are in Nashville, and they are very—how many of them are there, are they heavy?

"A. Tax schedules weigh, I suppose, seventy pounds to the book, sixty-five to seventy pounds to the book, and there is quite a collection of them.

"Q. For each year, you mean?

"A. Yes, sir."

As to the year 1914 and Augusta Dickel's assessability for that year, the assessment date in the tax year is January 10th, so that all assessments are as of that date. During those years, 1912 to 1916, Victor E. Shwab claimed to be a non-resident of the city. I guess I know where he actually lived, where he stayed.

Cross-Examination.

By Mr. Keeney:

I am in the habit, in my office, of sending out notices asking the taxpayers of the municipality to make personal property returns. I have not got a copy of the printed form that we used, only for the merchants ad valorem, there is a copy there, and my blank schedules I didn't bring a copy of. I sent out several classes of schedules, and industrial corporation schedule, one for banks, copartnerships and individuals.

"Q. And this request for statement of the amount of property—return of the property of merchants ad valorem tax, as I understand it, you were in the habit of sending to George A. Dickel & Company?

"A. That is delivered by one of my assistants in person at the various places of business."

Vernon H. Sharp.

That they were in the habit of filling out and sending in to my office since my induction into the office. They have done that regularly each year and have been assessed each year a merchant's ad valorem tax as long as they remained in business at Nashville.

Aside from this request for the return of personal property for the assessment of the merchants ad valorem tax, we mailed out blank schedules indiscriminately each year, to all classes of taxpayers that we thought were liable for any kind of personal tax. We were in the habit, among others, of sending out these demands to the ordinary taxpayer of the city to prepare and return to us the amount of personal property or personal securities that he owned. I would have to approximate how many thousand of those we have sent out in each year during my connection with the office. I will say three thousand is my best recollection. That is, commencing the tenth day of January. It would be hard for me to answer what proportion of the taxpayers in Nashville whose names appear upon our rolls the three thousand would be. I really don't know how many individual taxpayers' names appear on my roll. My rolls naturally constitute a lot of taxpayers that are non-residents. On the other hand, of course, taxpayers on my tax rolls on small homes that are not liable for any personal tax, they have no personal holdings, except possibly their little household effects, etc., which would be within the exemption of the law. I don't know how many thousands there are in all. I have a good idea of about how many assessments appear on my books. I think there is about 45,000 assessments, possibly some individuals, some single individual would undoubtedly carry maybe twelve or fifteen hundred of those assessments, in one or two cases. I have a separate assessment for each lot of my realty rolls, and my personal assessments of various kinds we made an estimate some time back and we approximated it at about 45,000 assessments on my tax rolls.

"Q. You send out, you say, about 3000 of those requests for return of personal property. In answer to those 3000 requests how many returns of personal property for assessment do you get from these persons to whom those notices are sent?"

Mr. Walker: I object as immaterial and irrelevant. I understand the previous question has been answered by another witness like that without objection, but in

G. A. Geer.

view of the limitations imposed upon my examination, I am inclined to think this is beyond the line.

The Court: I will sustain the objection.

Mr. Keeney: Note an exception."

Redirect Examination.

By Mr. Walker:

(Witness was shown a paper.) That is the form of one of the ad valorem merchants stock assessments that was used in 1916, the schedule of George A. Dickel & Co.

Mr. Walker had this marked Exhibit "3."

It has no bearing on bonds.

G. A. Geer,

being duly sworn as a witness in behalf of defendant, testified as follows:

Direct Examination.

By Mr. Walker:

I live in Nashville, Tennessee. I am in the service of the Government of the United States as Internal Revenue Agent. I am Assistant to the Revenue Agent in Charge at Nashville, Tennessee. Mr. F. L. Boyd is the Revenue Agent in charge. He is connected with the Department of Internal Revenue. We work for the Commissioner of Internal Revenue. It is not a collector's office at all. It is an inspection force. At the direction of my superior officer I made some investigation of this Augusta Dickel matter. In so doing, among other things, I saw Mr. Victor E. Shwab. I asked him for any books or records that he had or kept, showing the state of the property or the income of Augusta Dickel, or between him and Augusta Dickel. That was in Nashville, Tennessee, at the American National Bank. He said he did not have those books there; he had no records at all himself. He said I could find them in Louisville, at the office of George A. Dickel & Co., his bookkeeper, Mr. R. P. Lawrence, would furnish me any information pertaining to his affairs. George A. Dickel & Co. have their business office at Louisville. Mr. Lawrence is chief bookkeeper; he is general bookkeeper; he is in charge of all the bookkeepers. That is where their regular place of business is. That is their wholesale house on Main street, in Louisville. The distillery is not operating, so far as I know. It was in Lynchburg, I believe, near Nashville; that is my best memory.

I went to see Mr. Lawrence upon that errand. Mr. Shwab said he was out of the city at the time, but he would make an arrangement to get him back in Louisville. In two or three days he called me and said Mr.

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Lawrence was in Louisville and I could see him. That was in April. I saw Mr. Lawrence there in Louisville. I asked him for all records pertaining to the affairs of Mr. Shwab, personally, and the affairs of Mrs. Dickel—the affairs of Mr. Shwab as executor of the estate of Mrs. Dickel, and also the records, if any, pertaining to the affairs of Mrs. Augusta Dickel and these bonds and securities. I did not care to see records subsequent to 1916. I only asked for records prior to that time, 1916 and prior years, up to the time of the death of Mrs. Dickel. Mr. Lawrence did not produce or show me those records. He said that George A. Dickel & Co. had moved to Louisville from Nashville in 1917, I think in the latter part of the year, and that he felt sure these books and records were misplaced, down to the year 1916, during the move; either lost or misplaced. I rather thought he might be able to find them if he would search through the old records, so I gave him one day to see if he could not locate these records and I called the next day and he told me he had been unable to find them. We could not find them. I found no records at all. He said he felt sure they were lost or misplaced; he would not be positive which, but one of the two. He could not remember anything definitely that was in them, although he had kept them. He had no particular knowledge of them except that he said he kept in there an account for Mr. Shwab, personally, and an account for Mrs. Dickel and, I believe, a joint account, he told me, a trustee account, but so far as figures were concerned, which I was most particularly interested in, he did not remember anything about that.

In the course of this investigation, I saw Dr. R. B. Armstrong, at Charlevoix, on the 28th day of April of this year. The purpose of that was with reference to Mrs. Dickel's last illness and whether or not he had attended her prior to her last illness. Dr. Armstrong, at that interview, told me what the blood pressure of Mrs. Dickel was when he took it, when he was called at the beginning of her last illness in 1916. He told me that it was 270. He said it was 270 when he first saw her, when she had a stroke of some kind. He said her pressure was terrifically high, or such some descriptive word as that, when he first saw her, the first of September. I asked on that subject, whether he took her blood pressure, Mrs. Dickel's blood pressure, before that time, the year before. The substance of what he said to me upon that subject was that he could not recall definitely whether

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when attending her prior to her last illness he observed the high blood pressure; he rather thought he had observed this high blood pressure during the previous summer, when she was in Charlevoix, Michigan. I asked him to refresh his recollection upon that point, if he could, and communicate with me. He did not do that.

Cross-Examination.

By Mr. Keeney:

If I recall correctly, I first began work on this case about the 16th day of April of the present year, or somewhere thereabouts. I am an investigator under the Internal Revenue Agent at Nashville. My investigation first started in Nashville. When through there, I visited Louisville and the firm of George A. Dickel & Co., and interviewed Mr. Lawrence and Mr. George Shwab, in charge of the business. I did not question George Shwab closely. From there I went to Detroit. I saw Mr. Spicer there. I went to the Detroit Trust Company. I am not sure that I there saw every record relative to this trust created by Mrs. Dickel under date of April 21, 1915, but I satisfied myself with regard to the payment of the income to Mr. Shwab, and had some talk with Mr. Spicer upon that point.

"Q. And didn't you say, at that time, to Mr. Spicer, that you were entirely satisfied that the money had been paid Victor E. Shwab just as the trust deed prescribed?"

Mr. Walker: I object to it as not proper cross-examination.

The Court: I will sustain the objection."

I believe I was in Detroit three days. I had other business there. I did not spend those three days at the office of the Detroit Trust Company, checking up. It did not require that length of time.

I also made an investigation with reference to this matter at Charlevoix. I went there to see Dr. Armstrong. I have not been in any other city in the course of my investigations into the facts of this case. I assume you would construe it that those investigations have been made by me as Revenue Agent and for the purposes of this trial. We are directed by a Commissioner of Internal Revenue to obtain certain information, which we endeavor to obtain. I have been at Louisville once on this investigation, and only once. I asked Mr. Lawrence for those books, and the first day I saw him, he told me he thought he could find them, and then I met him the next day and he hadn't been able to find them. I knew before

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I went to Louisville that in the year 1917, the firm of George A. Dickel & Co. had removed from Nashville, Tennessee, to Louisville, Kentucky. I knew that as a resident of Nashville; I knew that the firm had removed from Nashville. I had no knowledge whatever as to whether all of the property that was connected with the firm business at Nashville was removed to Louisville.

I had a talk with Dr. Armstrong, at Charlevoix, with reference to this matter, and I talked with him with reference to Mrs. Dickel's blood pressure. Dr. Armstrong talked with me for some length of time about this case, some little time. He came in from Chicago during the evening and I endeavored to get him. I had gotten in earlier and I went to his office and he was not there and I went to his residence and I learned he had gone to Chicago, but was expected back that evening. I left a card and when he came in, he came to my hotel and we discussed it at some length.

I am not sure that I was here in the court room all the while that Dr. Armstrong was examined as a witness, but I was here part of the time. I cannot be positive that I heard all of the questions that were put to him by Mr. Walker.

"Q. Among other things, did you not hear the testimony that was given by Dr. Armstrong at that time that in talking with you about Mrs. Dickel's case he made an illustration by way of comparing her case with that of another patient whom he had had, whose blood pressure was alarmingly high?

"A. Yes, sir; I heard that illustration.

"Q. And are you willing to tell this jury that Dr. Armstrong did not say to you at that time that he had had another patient, a woman, who had a blood pressure of 270 or 280?

"A. You mean during our discussion in the evening at Charlevoix?

"Q. At Charlevoix?

"A. No, sir; I never heard any statement of that kind.

"Q. You never heard him mention any other woman who was a patient of his who had this alarmingly high blood pressure of 270 or 280 degrees?

"A. No, sir."

"Q. You also heard Dr. Armstrong say, did you not, upon his cross-examination by Mr. Walker, that he could not recollect that he had ever taken Mrs. Dickel's blood pressure at any time prior to this time when she had her seizure shortly before her death?

G. A. Geer.

Mr. Walker: That is objected to as incompetent.

The Court: I think I will sustain that objection.

Mr. Keeney: Just note an exception to the ruling."

This conversation that I had with Dr. Armstrong was in the evening. Dr. Armstrong said to me that he would look up certain facts and let me know. I did not say to him that I would see him on the morning of the following day. I asked him if he would meet me in his office the next morning at eight o'clock. He said he would be glad to do it, and during the night he would look up such information as I had requested, I went to his office at 8 o'clock, and he was not there. I went back to my room and wrote him a letter requesting him to forward to me, at Nashville, Tennessee, the information I had requested of him the night before. He did not furnish such information. I put the letter under his door, pushed it through under the door. I went back there, delivered this letter, say forty-five minutes later, 8:45. I don't know where the doctor was that morning. I haven't the slightest idea as to whether he had been called out upon some urgency case. I did not communicate with the doctor at any time after that upon that subject matter; not at all.

Redirect Examination.

By Mr. Walker:

I left Charlevoix on the 29th. I believe I left at 9:15 in the morning. I just had time, after catching the taxi-cab, to get on the train, and I had just been to the office.

"Q. Did Dr. Armstrong tell you, at any time in his conversation about Mrs. Dickel, that when he took her blood pressure there this last time, or at any other time that he ever mentioned it, that it was 180 or thereabouts?

"A. He couldn't remember definitely if he had taken it.

"Q. Did he tell you that when he did take it, the time he did take it, it was 180?

"A. No, sir. The only time he told me that he remembered definitely of taking it was during her last illness and he agreed to look up—

"Q. What was it then?

"A. 270."

Recross Examination.

By Mr. Keeney:

It is correct that when I had this interview with Dr. Armstrong upon the evening of the 28th of April, he told me that the only time that he definitely remembered tak-

Plaintiff's Requests.

ing Mrs. Dickel's blood pressure was during her last illness.

Redirect Examination.

By Mr. Walker:

The other statement stands as I made it, in regard to the rest that he told me. He agreed to look up to see whether he had or not.

At the conclusion of the testimony of Mr. Geer, both plaintiff and defendant rested their cases; whereupon the jury was excused pending the presentation to the court of legal questions.

After the jury was excused, Mr. Keeney moved, in behalf of plaintiff, that the court, upon the undisputed proofs, direct a verdict for the plaintiff.

The plaintiff also submitted the following requests to charge:

In the District Court of the United States for the Western District of Michigan, Southern Division.

Victor E. Shwab, Executor of the last will and testament of Augusta Dickel, deceased, plaintiff, vs. Emanuel J. Doyle, United States Collector of Internal Revenue for the Fourth Collection District of Michigan, defendant.

Plaintiff's Requests to Charge.

I. Upon the undisputed proofs, your verdict must be for the plaintiff in this cause.

II. Upon the undisputed proofs in this cause, you are instructed to find a verdict in favor of the plaintiff, and against the defendant, for the amount paid by plaintiff to defendant under protest, for estate tax, upon the transfer of date April 21, 1915, made by Augusta Dickel to Detroit Trust Company, the amount of such estate tax being \$56,546.41; and in arriving at your verdict you will also add interest on said sum at five per cent. (5%) per annum from December 15, 1917, the date of such payment, down to the present time.

Plaintiff's Requests.

If the foregoing requests are refused, then and not otherwise, we ask the court to charge the jury as follows:

III. The deed of trust of date April 21, 1915, took effect on its execution and delivery in or about April, 1915. It did not take effect at or after Mrs. Dickel's death, but more than a year prior thereto, and also more than a year prior to the enactment by Congress of the Estate Tax Law. Forthwith upon the delivery of the instrument, the legal title to the securities described in the trust deed passed from Mrs. Dickel to the Detroit Trust Company and vested in it. I therefore charge you that the defendant has no defense to this suit under that provision of the Act of Congress relating to the making of transfers or the creation of trusts to take effect in possession or enjoyment at or after the death of the decedent.

IV. The Act of Congress of September 8, 1916, provides in substance, that the value of the gross estate of the decedent shall be determined by including the value at the time of her death, of all property, real or personal, to the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which she has created a trust in contemplation of death. I charge you that the words "in contemplation of death" do not refer to that general expectation of death which every mortal entertains, but rather the apprehension which arises from some existing condition of body or some impending peril.

V. If you find that when Mrs. Dickel made the deed of trust in question, she was an old woman, somewhat enfeebled as the result of old age, and that she must have known that she could not live many years longer, yet if you further find that she was then under no apprehension of death arising from some existing condition of body or some impending peril, I charge you that the deed of trust was not made by her "in contemplation of death," within the meaning of that phrase, as used in the Act of Congress.

VI. It appears that Mrs. Dickel made the transfer to the Detroit Trust Company in or about the month of April, 1915, and that the Act of Congress, known as the Estate Tax Law, was not passed until September 8, 1916. I charge you, therefore, that there is no proof in this case tending to show that the transfer made by Mrs. Dickel to the Detroit Trust Company was made for the

Plaintiff's Requests.

purpose of defrauding or evading the Federal Revenue Law.

VII. In determining whether the transfer by Mrs. Dickel to the Detroit Trust Company was or was not made "in contemplation of death" within the meaning of the statute, one of the elements proper to be considered is whether there was or was not an intent on the part of Mrs. Dickel to escape or avoid payment of the Estate Tax. Inasmuch as the Estate Tax Law was not passed by Congress until some sixteen months after the making of the transfer, I instruct you that this element of intent to escape or avoid the payment of the Estate Tax is wholly wanting in the suit at bar, and this is a circumstance which you are entitled to consider in arriving at your conclusion as to whether the transfer by Mrs. Dickel was or was not made in contemplation of death.

VIII. There is proof in this case tending to show that one purpose of the transfer made by Mrs. Dickel to the Detroit Trust Company was that the Detroit Trust Company was a corporation organized under the Michigan laws, and doing business in this state, and that, by virtue of the transfer so made, it would be possible to take advantage of the Michigan statute, whereby securities of the character of those specified in the trust deed could be exempted from taxation upon paying to the County Treasurer of the proper county a tax of one-half of one per cent. under the Michigan laws. I charge you that Mrs. Dickel was lawfully entitled to make the transfer to the Detroit Trust Company, with the intent and for the purpose of thus availing herself of the benefits of this Michigan Tax Law, or to enable the beneficiaries under the deed of trust to procure for themselves that advantage.

IX. The Act of Congress provides that any transfer of a material part of the decedent's property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to her death, without a fair consideration in money or money's worth, shall, unless shown to the contrary, be deemed to have been made in contemplation of death, within the meaning of the Act. I instruct you that this does not mean that if the transfer is made within two years prior to the death of the decedent it will be conclusively presumed that the transfer was made in contemplation of death, but only that if all the conditions recited in the Act exist, the burden of proof is shifted and there is raised, by the terms

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of the law, a presumption that the transfer is made in contemplation of death. In other words, if the transfer is of "a material part" of decedent's property; if it is "in the nature of a final disposition or distribution thereof"; and if it is made "within two years prior to his death," without consideration, it is not even then declared to be made "in Contemplation of death." The Act merely declares that "unless shown to the contrary" it shall in such case be deemed to have been made "in Contemplation of death." But this is a presumption merely and may be rebutted by proofs in the cause; and I instruct you that if the plaintiff has shown, by a preponderance of evidence, that when Mrs. Dickel made the deed of trust in question she had only the general expectation of all rational mortals that she would die some time, but that she was then laboring under no apprehension of death arising from some existing infirmity or impending peril, the deed in question was not made "in Contemplation of death" within the meaning of those words, as used in the Act of Congress.

X. There is testimony to the effect that in making Mrs. Dickel's income tax return for 1915, signed by Mr. Shwab in her behalf, there was included interest received during that year upon the securities in the hands of the Detroit Trust Company. Mr. Shwab has testified that this was done by mistake. I charge you that the fact that this item of interest was so included in the tax return for that year signed by Mr. Shwab for Mrs. Dickel does not tend to show that the deed of trust of date April 21, 1915, made by Mrs. Dickel to the Detroit Trust Company, and executed and delivered more than a year before her death, was intended to take effect or did take effect at or after her death, nor does it tend to show that it was made by her in contemplation of death.

XI. I instruct you that the Act of Congress of September 8th, 1916, is not retrospective in character, and that it does not impose a tax upon the deed of trust of date April 21, 1915, executed and delivered by Augusta Dickel to the Detroit Trust Company before the enactment of the law.

XII. I instruct you that if the Act of September 8th, 1916, could be construed to be retrospective and to impose a tax upon the transfer of April 21, 1915, it would be unconstitutional and void as a denial of due process of law, and the taking of private property for public use

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without compensation contrary to the Fifth Amendment to the Constitution of the United States.

Dated June 13th, 1919.

Butterfield, Keeney & Amberg,
Attorneys for Plaintiff."

The legal questions presented by the motion for a directed verdict and the request to charge were argued in behalf of plaintiff by Mr. Keeney and Mr. Amberg, and in behalf of defendant by Mr. Walker and Mr. Kelleher.

At the conclusion of the legal argument, the court rendered its opinion, as follows:

The Court: It is unfortunate that the requirements of a jury trial do not afford sufficient opportunity to consider and digest the able arguments which have been made by counsel upon both sides of this case upon a question of such large importance.

The conclusions which have been reached may be thus briefly and crudely stated:

The claim of plaintiff that the tax here in controversy was imposed and collected unlawfully and without authority rests primarily upon the assumption that such tax was one upon the transfer of the trust property conveyed by the decedent, Mrs. Dickel, to the Detroit Trust Company, in April, 1915, or between the dates of the 21st day of April and the 3rd day of June, 1915, and hence from fifteen to seventeen months prior to the enactment of the statute under which the tax was levied. The claim is that the transfer or creation of the trust was a transaction completed more than a year before the tax law went into effect.

So far as appears, this claim is well founded. Mrs. Dickel reserved in the trust conveyance no right or control or possession or enjoyment of the trust fund or its

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income derived therefrom. The title to the trust fund was vested absolutely in the trustee and the rights of the beneficiaries under the trust apparently became fully vested at the time of the execution and delivery of the trust conveyance. The contention is that no power resided in Congress to levy a tax retrospectively upon that transfer and that the attempt to levy the tax upon that transfer was violative of rights which are protected by the Federal Constitution.

If the tax here in controversy was not imposed upon the transfer of the trust fund by Mrs. Dickel to the Detroit Trust Company, then the argument advanced in behalf of plaintiff fails.

Was the tax involved in this controversy a tax upon that transfer? The answer to this question depends upon the interpretation or construction to be given to the Act of Congress under which the tax was levied. The Estate Tax Statute of 1916 is a part of the General Revenue Act of that year, and the Sections of the Act here important to consider are Sections 201, 202, 203 and 209.

Section 201 provides: "That a tax equal to the following percentages of the value of the net estate, to be determined as provided in Section 203, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act." It is true that the term "net estate" occurs twice in this section. But it does not necessarily follow that the term is used with the same meaning in both instances. Indeed, the context shows quite clearly that the "net estate" first mentioned is merely an important and essential element of the measure of the tax, while the other is the actual net estate of the decedent upon the transfer of which the tax, so measured, is to be levied.

"The value of the "net estate" which constitutes an element of the measure of the tax is to be determined in the manner provided in the subsequent section of the Act. The "net estate" upon the transfer of which the tax is to be assessed is that part of the decedent's estate which will be distributed to those entitled thereto either under the provisions of his will or in accordance with the laws of distribution and descent.

The latter part of Section 201 and Sections 202 and 203 prescribe the method of determining the amount of the tax.

Section 209 provides the remedy or means for the collection of the tax. Transfers made or trusts created by

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the decedent during his lifetime, without consideration "and in contemplation of or intended to take effect in possession or enjoyment at or after his death" are to be considered solely for the purpose of determining the measure or amount of the tax and not for the purpose of determining the property upon the transfer of which the tax is to be laid. So that it seems entirely clear that Section 201 imposes the tax upon the transfer of the net estate existing and belonging to the decedent at the time of his death, while Sections 202 and 203 provide for the ascertainment of the measure, and thereby the amount, of the tax which shall be imposed upon such net estate, regardless of its amount or value.

This construction of the statute gives to the language thereof its ordinary and natural meaning and removes whatever doubt might otherwise exist as to the validity of the legislation.

In the present case we are not concerned with the questions of whether a valid tax could have been imposed if the whole of Mrs. Dickel's property had been included in the conveyance of the Detroit Trust Company and she had died possessed of no estate, or whether the tax could have been collected from the trustee if it had not been paid by the executor. Mrs. Dickel left an estate of the value of approximately \$800,000 to be distributed in accordance with the provisions of her will.

The executor has paid the tax and, in this suit, seeks to recover for the estate which he represents what he has been compelled to pay. Whatever the result of this litigation may be, neither the trustee nor the beneficiaries under the trust will be affected. It will be time enough to determine the rights and liabilities of a trustee or transferee when a case is presented involving that question. If that portion of Section 209 which creates a possible lien upon the property transferred and a contingent liability on the part of the trustee or transferee should be declared unconstitutional, the other provisions of the statute would not be affected.

It is argued by counsel for the plaintiff that to give the statute the construction here announced might, in some cases, create gross inequality and injustice. In matters of taxation, the Congress is clothed with broad powers and exact equality is a practical impossibility. Courts may not inquire as to the advisability or even the justice of taxes. Courts have no interest in the question of the amount of the tax imposed or the methods

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provided for its collection, provided that both the tax and the methods are within constitutional limitations.

It is said in argument, as an extreme illustration, that if a decedent, prior to his death, has conveyed and transferred all of his property, so that nothing remains, there could be no tax because there would be nothing upon which it could be assessed. That may be true. But even in such case, no unconstitutional inequality would be created. This statute acts alike upon all estates of the same character and in the same situation, and that is all that is required. One of the vices of this contention or thought is that it relates alone to the beneficiaries of the decedent's estate and not to the estate itself. At the time of the death of the person, the transfer of whose estate is taxed, the beneficiaries have no vested rights which cannot be interfered with or disturbed.

Two questions of fact are presented for determination. Counsel for defendant insist that there is evidence to go to the jury upon the question of whether or not the trust created by Mrs. Dickel was to take effect in enjoyment or possession at or after her death. A careful consideration of the evidence in all its bearings convinces me that there is not sufficient evidence to warrant the submission of that question to the jury. The trust conveyance is absolute in its terms and contains no reservation of any kind or character. Mrs. Dickel had no interest in the trust property or the income therefrom after the creation of the trust. The only fact which has any possible bearing to the contrary is that for the year 1915, Mr. Shwab, as the agent of Mrs. Dickel, inadvertently and unknowingly, as he claims, included in the income tax return of Mrs. Dickel a part of the income which had been received from the Detroit Trust Company. Whether this action on his part was inadvertent or not is quite immaterial. The most that could be said is that Mr. Shwab intermingled the trust income with the funds of the firm of George A. Dickel & Company belonging jointly to himself and Mrs. Dickel, or that his intention was to give that part of the income to Mrs. Dickel.

There is nothing to indicate any contract or agreement or understanding with Mrs. Dickel to receive the income during her lifetime and until her death and that the trust property should not be enjoyed and possessed by the trustee and the beneficiaries regardless of the length of her life.

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In my judgment there is not sufficient evidence to warrant the submission of this question to the jury.

The other question of fact is whether this trust was created by Mrs. Dickel in contemplation of her death. It is urged by counsel for plaintiff that the proof is so convincing and so clear that the trust was not created by Mrs. Dickel in contemplation of her death that the case ought to be taken from the jury. On the other hand, it is contended by counsel for defendant that the evidence requires the submission of that question to the jury.

I am inclined to agree with counsel for the defendant. The trust having been created within two years of the death of Mrs. Dickel, the statute itself raises a strong presumption that it was created in contemplation of her death. In addition to the statutory presumption, there are many circumstances which bear one way or the other upon this question. The age of Mrs. Dickel; her condition of health; the fact that almost contemporaneously with the creation of the trust, Mrs. Dickel, Mr. Shwab and Mrs. Shwab made their wills and thereby provided for the transfer of the property to the same beneficiaries, and other facts and circumstances which might be mentioned are all matters which the jury have a right to consider.

Considerable prominence has been given to the question of the purpose of locating the trust in the State of Michigan.

Plaintiff claims that Michigan was selected because its tax laws are more favorable. Defendant contends to the contrary. This is a collateral issue which may have some indirect bearing upon the principal question of whether the trust was created by Mrs. Dickel in contemplation of her death.

A more perplexing, although subsidiary or secondary, question is what instruction shall be given to the jury as to the meaning of the term "in contemplation of death." The authorities are not in harmony upon this subject. All are agreed that the term does not mean the general expectancy of death entertained by all human beings. At the present day, all are also agreed that gifts made "in contemplation of death" are not necessarily limited to gifts causa mortis or in extremis.

Counsel for plaintiff insist that a transfer is not made in contemplation of death unless through disease, injury, peril or other cause, death is apparently imminent.

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Counsel for defendant urge that a transfer made from a motive which would prompt the execution of a will may be said to be made in contemplation of death. The presumption created by the statute seems to negative the claim of plaintiff, and it is somewhat far fetched to say that a transfer or gift dictated by the prudence and wisdom which induce a reasonable man, enjoying good health and expecting to live out his natural span of life, to make his will is made in contemplation of death.

I have searched the books in vain for a satisfactory definition of this term and the best one that I have been able to evolve from my own mind is this: A transfer or gift of property without consideration is made in contemplation of death when the moving cause of such transfer is the expectation or anticipation of death either immediately or in the reasonably close future.

The gift must be testamentary in character and coming death must be the moving cause for its making. In substance this definition will be given to the jury for its guidance.

The motion for a directed verdict will be denied and an exception to the ruling will be noted."

At the conclusion of this opinion of the Court, the jury was recalled to the court room, and after hearing arguments by Mr. Kenney and Mr. Amberg, in behalf of plaintiff, and Mr. Walker, in behalf of defendant, the court charged the jury as follows:

"Gentlemen of the Jury: The plaintiff in this case is the executor of the last will and testament of Augusta Dickel, deceased. The defendant is the Collector of Internal Revenue for this District of Michigan. The controversy relates to an estate tax paid by the executor, the plaintiff, to the defendant, upon the transfer of the estate

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of Augusta Dickel, which the plaintiff claims was unlawfully exacted and which it is sought to recover back. At the time of her death, Augusta Dickel was a resident of Charlevoix County, in this State. She died on the 16th day of September, 1916. On April, 1915, or about seventeen months prior to the time of her death, she made and executed a trust conveyance to the Detroit Trust Company, thereby conveying or transferring to that company, in trust, property of the value of approximately one million dollars. On the 8th day of September, 1916, and hence just eight days prior to the death of Mrs. Dickel, the Congress of the United States enacted what is commonly known as an Estate Tax Law. That law was a part of the General Revenue Act for the year 1916. By the terms of that Act there was imposed a tax upon the transfer of the estate of every person dying thereafter, and the law provided the method of computing and determining the amount of the tax which was so imposed. The law authorized the taking into consideration in certain instances and under certain conditions, of property which had been transferred absolutely, prior to the death of the person making the transfer, in arriving at the amount of the tax which was to be computed. Among other provisions of the law was one which in substance authorized the taking into consideration by the Tax Collector, or the Commissioner of Internal Revenue in levying the tax, property which had been transferred without consideration, that is, a gift, at any time prior to the death of the person making the transfer, provided that such transfer when it was made, was made in contemplation of death. The provision of the statute in that regard is substantially this: that in assessing the tax, there may be taken into consideration any property, to the extent of any interest therein, of which the decedent has at any time made a transfer, or with respect to which he has created a trust in contemplation of death, except in case of a bona fide sale for a fair consideration in money or money's worth.

This controversy arises concerning the transfer which Mrs. Dickel made to the Detroit Trust Company of approximately a million dollars worth of property in April, 1915, or about seventeen months prior to her death. In computing the amount of the tax which was levied upon the transfer of her estate—and her estate was a considerable one, amounting, at the time of her death to some 750 or 800 thousand dollars, exclusive of the property

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transferred to the Detroit Trust Company—and by the transfer in the sense it is used in this statute is meant the transfer by reason of the death of the decedent, there was included in the computation of the tax so assessed the value of the property transferred to the Detroit Trust Company. By the transfer to the Detroit Trust Company there was created a trust, and by that transfer Mrs. Dickel absolutely parted with the title to the property transferred; she retained no control nor possession nor right of possession over the same; the control and possession of the same was in the Detroit Trust Company in trust for the beneficiaries named in the trust conveyance, namely, her brother-in-law, that is, the husband of her sister, and their children and children's children eventually.

The plaintiff claims that the Collector of Internal Revenue or the Commissioner of Internal Revenue had no right nor authority to take into consideration the property so transferred to the Detroit Trust Company because, as the plaintiff claims, that transfer was not made by Mrs. Dickel in contemplation of her death.

The defendant claims that that transfer was rightfully taken into consideration because the property was transferred by Mrs. Dickel in contemplation of her death.

That presents the sole question for your determination: did Mrs. Dickel, in April, 1915, transfer to the Detroit Trust Company the trust property, in contemplation of death; that is to say, at the time of making the transfer, did she have in contemplation her own death and was that the reason for making the transfer to the Detroit Trust Company?

By the term "in contemplation of death" is not meant on the one hand the general expectancy of death which is entertained by all persons, for every person knows that he must die. That is not what is meant by the term "in contemplation of death." On the other hand, the meaning of the term is not necessarily limited to an expectancy of immediate death or a dying condition. We speak of gifts *causa mortis*, that is, gifts made because the person is in death or is dying. That condition is not what is meant. The term "in contemplation of death" involves something between these two extremes. Nor is it necessary, in order to constitute a transfer in contemplation of death, that the conveyance or transfer be made while death is imminent, while it is immediately impending by reason of bodily condition, ill health, disease or

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injury or something of that kind. But a transfer may be said to be made in contemplation of death if the expectation or anticipation of death in either the immediate or reasonably distant future is the moving cause of the transfer. And in this case if you find that Mrs. Dickel, in April, 1915, was moved to create the trust and to make the transfer to the Detroit Trust Company by her expectation or anticipation of death in either the immediate or the reasonably distant future, then you will be warranted in finding that this transfer was made in contemplation of death.

On the other hand, if you find from the evidence in the case that the moving cause of the making of this transfer or the creation of the trust to the Detroit Trust Company, was not her expectation or anticipation of death, you must find that the transfer was not made by her in contemplation of death.

In determining that question you have a right to take into consideration all of the evidence in the case. You have a right also to take into consideration the provisions of the statute which Congress has enacted in that regard; and upon that subject the statute is this: Any transfer of a material part of his property in the nature of a final disposition or distribution thereof made by the decedent within two years prior to his death, without consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title. By that statute Congress created a rule of evidence merely. That statute raises a presumption that if a transfer is made within two years of the death of the person making the transfer, it is presumed to have been made in contemplation of death, unless the contrary is shown; and the burden in this case is upon the plaintiff to establish by a fair preponderance of the evidence, taking into consideration the presumption which the statute creates, that this transfer was not made by Mrs. Dickel in contemplation of her death.

You have a right, in determining that question, to take into consideration all of the facts and circumstances shown by the evidence to have surrounded the creation of this trust and the making of this transfer to the Detroit Trust Company.

You should consider the question as of April, 1915, and consider the conditions that existed at that time and not at a later time. You have a right to take into considera-

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tion the age of Mrs. Dickel; you have a right to take into consideration her physical condition, her mental condition, the condition of her health, in other words, at that time; you have a right to take into consideration the character of the trust which was created, the beneficiaries under the trust; take into consideration any other instruments, like wills that were executed about the same time; take into consideration all of these matters and then say, from the evidence in the case, bearing in mind the presumption which the statute raises and giving it the consideration to which it is entitled, and it is to be considered by you in connection with the other evidence in the case, whether or not that transfer by Mrs. Dickel to the Detroit Trust Company, at that time, was made by her in contemplation of her death. She had a right to dispose of her property as she saw fit, and if, in fact, out of love and affection, or for any other reason, she desired to and did dispose of her property to her relatives without regard to her death, and intended that they should have the use and benefit and enjoyment thereof, and did not, in making the disposition, take into consideration her own death, or if, at that time, she made the disposition without regard to her death, and simply as a gift that they should enjoy at once, and her death was not the moving cause of her making the disposition, then you will find that the transfer was not made in contemplation of death. On the other hand, if you find from the evidence and all the evidence in the case, that the moving cause of that transfer was her expectation and anticipation of her death, it will be your duty to find that the transfer was made in contemplation of death.

There is one other matter, gentlemen, concerning which I think I ought to say a word. There has been considerable testimony in this case concerning taxes upon property. That testimony has been admitted solely for the purpose of aiding you in determining the primary question as to whether this transfer was made in contemplation of death. We are not concerned otherwise with the question of taxation in Tennessee, or in Michigan, or with the question as to whether somebody has tried to evade the payment of his taxes. In that regard you should not be prejudiced either before or against the plaintiff. The testimony upon that subject has been admitted solely for the purpose of aiding you to determine whether this transfer was made in contemplation of death, and for no other purpose.

Plaintiff's Exceptions.

If you find for the plaintiff in the case, that is to say, if you find that the conveyance was not made or the transfer was not made to the Detroit Trust Company by Mrs. Dickel in contemplation of her death, you will find in the sum of the tax which has been paid and which is now sought to be recovered back, namely, \$56,546.41, together with interest thereon from the date when it was paid, December 15, 1917, to the present day, and the amount of the interest as computed is \$4225.28, making a total sum, if you find in favor of the plaintiff—and some of you better take these figures—if you find in favor of the plaintiff, you will award the plaintiff the sum of \$60,771.69. If you find that the transfer to the Detroit Trust Company was made by Mrs. Dickel in contemplation of death, your verdict will be in favor of the defendant, no cause of action.

Mr. Clerk, you may swear an officer.

A Juror: Your Honor, may we have a copy of that Federal statute, that pamphlet Mr. Walker has here would probably cover it.

The Court: Are there any annotations upon that?

Mr. Walker: There are some regulations under it.

The Court: I think, gentlemen, that that would not be of any assistance.

Mr. Walker: Probably only the wording is all.

The Court: The whole question is the question of whether the transfer was made in contemplation of death; that is all there is to it. If you desire further instructions, you may return."

Immediately upon the conclusion of the foregoing charge to the jury and in the presence of the jury and before it had retired, plaintiff, by his attorneys, excepted to the refusal of the court to give the requests of plaintiff to charge the jury, numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12.

Plaintiff's Exceptions.

The plaintiff also excepted to that portion of the charge of the court, wherein it instructed the jury as follows:

"The law authorizes the taking into consideration, in certain instances and under certain conditions, of property which had been transferred absolutely prior to the death of the person making the transfer, in arriving at the amount of the tax which was to be computed."

The plaintiff also, at this time, excepted to that portion of the charge of the court wherein it instructed the jury as follows:

"Among other provisions of the law was one which, in substance, authorized the taking into consideration by the Tax Collector or the Commissioner of Internal Revenue, in levying the tax, property which had been transferred without consideration, that is, as a gift, at any time prior to the death of the person making the transfer, provided that such transfer, when it was made, was made in contemplation of death."

The plaintiff also, at this time, excepted to that portion of the charge wherein the court instructed the jury as follows:

"That presents the sole question for your determination: Did Mrs. Dickel, in April, 1915, transfer to the Detroit Trust Company the trust property in contemplation of death, that is to say, at the time of making the transfer, did she have in contemplation her own death, and was that the reason for making the transfer to the Detroit Trust Company?"

Plaintiff also, at this time, excepted to that portion of the charge wherein the court instructed the jury as follows:

"On the other hand, the meaning of the term ('in contemplation of death') is not necessarily limited to an expectancy of immediate death or a dying condition. We speak of gifts *causa mortis*, that is, gifts made because the person is in death or is dying. That condition is not what is meant."

Plaintiff also, at this time, excepted to that portion of the charge wherein the court instructed the jury as follows:

"Nor is it necessary, in order to constitute a transfer in contemplation of death, that the conveyance or transfer be made while death is imminent; while it is immediately pending by reason of bodily condition, ill health, disease or injury or something of that kind."

Plaintiff also excepted at this time to that portion of

Plaintiff's Exceptions.

the charge wherein the court charged the jury as follows:

"But a transfer may be said to be made in contemplation of death if the expectation or anticipation of death in either the immediate or reasonably distant future is the moving cause of the transfer."

Plaintiff, at this time, also excepted to that portion of the charge in which the court instructed the jury as follows:

"And in this case, if you find that Mrs. Dickel, in April, 1915, was moved to create a trust and to make the transfer to the Detroit Trust Company by her expectation or anticipation of death in either the immediate or the reasonably distant future, then you will be warranted in finding that this transfer was made in contemplation of death."

Plaintiff, also, at this time, excepted to that portion of the charge wherein the court instructed the jury as follows:

"In determining that question, you have a right to take into consideration all the evidence in the case. You have a right also to take into consideration the provisions of the statute which Congress has enacted in that regard, and upon that subject the statute is this:

"Any transfer of a material part of his property, in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death, without consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.

"By that statute, Congress created a rule of evidence merely. That statute raises a presumption that if a transfer is made within two years of the death of the person making the transfer, it is presumed to have been made in contemplation of death, unless the contrary is shown, and the burden in this case is upon the plaintiff, to establish by a fair preponderance of evidence, taking into consideration the presumption which the statute creates, that this transfer was not made by Mrs. Dickel in contemplation of her death."

The plaintiff also, at this time, excepted to that portion of the charge wherein the court instructed the jury as follows:

"Take into consideration any other instruments, like wills that were executed about the same time."

Plaintiff, also, at this time, excepted to that portion of the charge wherein the court instructed the jury as follows:

Motion for New Trial.

"Take into consideration all of these matters and then say from the evidence in the case, bearing in mind the presumption which the statute raises and giving it the consideration to which it is entitled, and it is to be considered by you in connection with the other evidence in the case, whether or not that transfer by Mrs. Dickel to the Detroit Trust Company, at that time, was made by her in contemplation of her death."

Plaintiff, also, at this time, excepted to that portion of the charge in which the court instructed the jury as follows:

"On the other hand, if you find from the evidence and all the evidence in the case that the moving cause of that transfer was her expectation and anticipation of death, it will be your duty to find that the transfer was made in contemplation of death."

After the making of the foregoing exceptions, the jury retired from the court room and thereafter returned and rendered a verdict for the defendant, no cause of action.

Whereupon, on motion of plaintiff in open court, an order was made by the court, allowing twenty days time to plaintiff within which to prepare a bill of exceptions, to move for a new trial or to take such other steps as he might be advised.

On the first day of July, 1919, within the time limited by the order of the court for that purpose, the plaintiff filed a motion for a new trial and caused a copy of the same to be served upon the attorneys for the defendant. Said motion was as follows:

MOTION FOR NEW TRIAL—Filed July 1, 1919.

Now comes the plaintiff, by Butterfield, Keeney & Amberg, his attorneys, and moves the court to set aside the verdict of the jury in this cause, and to grant a new trial thereof, for the following reasons:

Motion for New Trial.

1. Because the weight of the jury is against the clear and overwhelming weight of the evidence.

2. Because, upon the undisputed facts in this case, the jury should have been directed to find a verdict for the plaintiff.

3. Because the court erroneously left it to the jury to determine as a matter of fact whether the deed of trust of date April 21, 1915, executed by Mrs. Dickel to the Detroit Trust Company, was made in contemplation of death, when there was no evidence in the case to support a verdict that said deed of trust was made in contemplation of death.

4. Because, if there were any evidence to go to the jury on which to base a verdict in favor of defendant, it was a scintilla merely, and should have been disregarded, and a verdict in favor of plaintiff should have been found.

5. Because the court erred in refusing to give to the jury plaintiff's requests to charge, numbered one to twelve, both inclusive.

6. Because the court erred in ruling that the Act of Congress of September 8, 1916, is retrospective in character, and that it does impose a tax upon said deed of trust of date April 21, 1915, or what amounts in substance to the same thing, that it does impose a tax upon the transfer of the estate owned by Mrs. Dickel at the date of her death, on September 16, 1916, which tax, however, is measured, not merely by the value of the estate so transferred, but, in addition, by the value of the property transferred by said deed of trust, which property had, prior to the passage of said Act, become vested absolutely in third parties.

7. Because the court erred in ruling that said Act of September 8, 1916, if construed so as to sustain the tax of \$56,546.41 paid by plaintiff under protest on December 15, 1917, was not unconstitutional or void as a denial of due process of law, and the taking of private property for a public use without compensation contrary to the Fifth Amendment to the Constitution of the United States.

8. Because the court erred in permitting the plaintiff to be cross-examined concerning confidential income tax returns filed by plaintiff for himself or as agent for Mrs. Dickel.

9. Because the court erred in charging the jury, among other things, substantially, that the meaning of the term "in contemplation of death" is not limited to an expectancy of immediate death, or a dying condition, and that

Motion for New Trial.

it is not necessary in order to constitute a transfer in contemplation of death, that the transfer be made while death is imminent, while it is immediately impending by reason of bodily condition, ill health, disease or injury, or something of that kind, but that a transfer may be said to be made in contemplation of death if the expectation and anticipation of death, in either the immediate or reasonably distant future, is the moving cause of the transfer, and that if the jury find that Mrs. Dickel, in April, 1915, was moved to create the trust, and to make the transfer to the Detroit Trust Company, by her expectation or anticipation of death in either the immediate or reasonably distant future, then the jury will be warranted in finding that this transfer was made in contemplation of death.

10. Because the court erred in charging the jury, among other things, substantially, that the jury have the right to take into consideration the provisions of the statute creating the presumption that transfers in the nature of a final disposition or distribution made within two years prior to death shall, unless shown to the contrary, be deemed to have been made in contemplation of death, and that the burden in this case is upon the plaintiff to establish, by a fair preponderance of the evidence, taking into consideration the presumption which the statute creates, that this transfer was not made by Mrs. Dickel in contemplation of death, and that the jury should say from the evidence in the case, bearing in mind the presumption which the statute raises, and giving it the consideration to which it is entitled, and it is to be considered by the jury in connection with the other evidence in the case, whether or not the transfer by Mrs. Dickel to the Detroit Trust Company at that time was made by her in contemplation of death.

11. Because the court erred in charging the jury, among other things, substantially, that the jury should take into consideration any other instruments, like wills, that were executed about the same time as said deed of trust.

12. Because the court committed other errors in the charge given to the jury, and in ruling upon evidence.

This motion is based upon the records and files in this cause, upon the testimony given and the charge given to the jury, and other proceedings had at the trial thereof.

Dated July 1st, 1919.

Butterfield, Keeney & Amberg,
Attorneys for Plaintiff.

Plaintiff's Exhibits.

The foregoing motion was brought on for hearing and was argued by counsel for the respective parties on the 31st day of July, 1919. On the 31st day of July, 1919, the court denied the motion for a new trial and an order was thereupon entered denying the same and granting to plaintiff an exception to the order of the court denying the motion.

Plaintiff's Exhibit "A."

March 10, 1914.

Mr. Howard J. Leshner, Tr., Detroit Trust Company, Detroit, Mich.

Dear Sir: One of my relatives is considering the idea of depositing several hundred thousand dollars of bonds as a permanent trust fund and is favorably impressed with the laws of Michigan, as to taxes, etc.

As we understand it, the party will have to be a resident of Michigan to be entitled to the advantages of your laws. Please inform us what charge you will make for handling and disbursing such a fund.

I refer you to J. E. Caldwell, President of the Fourth-First National Bank of this City, or to F. O. Watts, President of the Third National Bank, St. Louis, Mo.

Your prompt reply will be appreciated.

Yours respectfully,

(Signed) V. E. Shwab.

Plaintiff's Exhibit "B."

Detroit Trust Company

Detroit, Mich.

March 13, 1914.

Mr. V. E. Shnoe, c/o Geo. A. Dickel & Co., Nashville, Tenn.

Dear Sir: Your letter of March 10th, addressed to Mr. Howard J. Leshner, Treasurer, is acknowledged. Mr. Leshner severed his connection with this company some two years ago.

We are of the opinion that a trust fund of taxable personal property with us, created under a voluntary trust agreement by a non-resident of Michigan, is properly taxable, in the State where the Owner resides or, in other words, is not taxable here. If, in the creation of the trust, the title to the property is divested by the original owner or maker of the trust, i. e., if the bonds, stocks, etc., are absolutely assigned, transferred and delivered, and the title vested in the Trustee, we are of the opinion that the property so trusted is properly subject to taxation in the State where the Trustee resides. We think

Plaintiff's Exhibits.

this would be true whether or not the trust was an irrevocable one, but so long as the trust continued and the property was held in trust, the above would apply.

In the case of an estate of a deceased person in Michigan held by a trustee under a will, for instance, the property is properly taxable at the place of last residence of the deceased.

To get the advantages of our recent law authorizing the payment of the specific tax of $\frac{1}{2}$ of 1% upon mortgages, bonds, notes, etc., the owner, or the securities themselves would necessarily have to be in such a position as to make them properly the subject of taxation in Michigan. This would necessitate the owners being a resident of Michigan or having the property held in such a way, in Michigan, as to make it properly taxable here.

As to the question of our charges for handling and disbursing a trust fund as suggested by you:

We would say that the basis of our charges in cases of this kind, where the property consists principally of bonds and income-producing stocks, etc., is 5% of the gross income collected, but these charges are dependent somewhat upon the nature and condition of the trust and its purposes. We can give you a more definite reply on knowing more definitely concerning these things, but as a general thing, we might say our charges are based upon the foregoing rate.

If we can be of any assistance to you in this or any other matter, we trust you will not hesitate to call upon us, and we appreciate your inquiry.

Respectfully yours,

Detroit Trust Company,

(Signed) C. P. Spicer,

Vice-President.

Plaintiff's Exhibit "C."

George A. Dickel & Co.

Cascade Distillery.

Nashville, Tenn., U. S. A.

April 15, 1915.

Detroit Trust Company, Detroit, Michigan.

Gentlemen: About a year ago I wrote you with respect to your acting as trustee under a deed of trust, the execution of which my sister-in-law, Mrs. Dickel, had in contemplation. Circumstances have operated to delay the matter, but it is now in a condition to be taken up again. Thinking that perhaps a draft of the proposed deed of trust would itself be the best explanation, Mrs.

Plaintiff's Exhibits.

Dickel has caused one to be prepared (by Tennessee counsel), a copy of which I herewith enclose to you. I send it that you may see, first, what she has in mind; second, what, if anything, you may advise as to alterations or changes so as to conform to the provisions of Michigan law, if there be any that conflict with it, and third, that you may advise us whether you will act as trustee, and for what compensation. It is our understanding that upon the payment of one-half of one per cent. these bonds will be subjected to no other or further taxation in your hands. Is that correct?

The bonds are worth about par and aggregate one million dollars.

I perhaps ought to explain that Mrs. Dickel is a childless widow, up in years, and that she has no relatives except my wife and her children, and that she spends most of her time with us. For years I have looked after and managed her business affairs. I may add that these bonds do not constitute Mrs. Dickel's entire estate.

If you think it would be better for the matter to be discussed in an interview, it would be agreeable to me, but in that event I would have to ask you to send your representative here, as my wife's health is such I cannot leave her. Of course I would expect to defray the expenses of your representative's coming in the event, for any reason, the matter should not be closed or perfected.

Hoping to hear from you at your earliest convenience, with such suggestions as to form and the nature of this trust as you may deem advisable, I am

Very respectfully yours,

(Signed) V. E. Shwab.

Plaintiff's Exhibit "D."

Detroit Trust Company.

Detroit, Mich., April 17, 1915.

V. E. Shwab, Esquire, Geo. A. Dickel & Co., Nashville, Tenn., U. S. A.

Dear Sir: We beg to acknowledge receipt this morning of your letter of April 15th, with which you enclosed a draft of proposed trust deed and agreement. We have read this over, and congratulate you upon it. It seems to us in very good form for the requirements here, complete, and comprehensive. It is certainly true, as you suggest, that a draft of the trust agreement is itself the best explanation of the wishes and intentions of the donor, and from it we are able to get a very clear idea of the situation. As we say, the form submitted seems

Plaintiff's Exhibits.

to cover the requirements so far as our local laws are concerned. There are, however, two or three things which occur to us as being more or less important, and which might tend, at least, to amplify the expressions of intention, and too, have been found by us, in our experience, to be important in matters of this kind.

These things it would obviously be difficult to explain and discuss satisfactorily in a letter, and we are very pleased indeed to avail ourselves of the opportunity of having our representative call on you in person, for this purpose.

Accordingly, the writer will plan to be in Nashville Tuesday morning next, April 20th, in the hope that he may have the pleasure of meeting you and going over the whole situation.

May we ask that you wire us upon your receipt of this letter, so that we may know early Monday morning, April 19th, whether or not a Tuesday morning appointment with you, as suggested, will be entirely agreeable to you? We will be very glad to accommodate our call to suit your convenience, and will await telegraphic word from you in reply.

We appreciate your submitting this business to us, and trust that we may be able to arrange an agreement which will be mutually satisfactory.

Respectfully yours,

Detroit Trust Company,

(Signed) C. P. Spicer,

Vice-President.

P. S. I will have to leave at 11:55 Monday morning to be in Nashville Tuesday, so please wire me immediately on receipt of this letter.

Plaintiff's Exhibit "E."

This instrument made and entered into this the twenty-first day of April, 1915, by and between Mrs. Augusta Dickel of Charlevoix, Michigan, party of the first part, and hereinafter for brevity sometimes referred to as "Mrs. Dickel," and the Detroit Trust Company, a corporation organized and existing under the laws of the State of Michigan, party of the second part, and hereinafter sometimes referred to as "The Company," witnesseth:

Whereas Mrs. Dickel is the owner of the securities hereinafter more particularly described, carrying at their face or par value the principal sum of one million dollars; and

Plaintiff's Exhibits.

Whereas she desires to make a division of the part of her estate particularly described herein, subject however to the terms, conditions, limitations and restrictions hereinafter expressed; now

Therefore in consideration of mutual benefits to the parties hereto and of the covenants and agreements of the Company to be performed, Augusta Dickel hereby assigns, transfers, sets over and delivers unto Detroit Trust Company the stocks and bonds or securities hereinafter described, with all their unmatured coupons and the proceeds to be derived therefrom, both principal and income, in trust however, for the term and purposes, with all the powers and authorities, and subject to the conditions and limitations hereinafter stated. The said securities so assigned, more particularly described, are as follows:

Interborough Rapid Transit Co. N. Y. First &		
Refunding Mortgage 5% bonds, dated January 1,		
1913, due January 1, 1966,		
25	numbers 50770 to 50394 inclusive	
10	" 50275 to 50284 "	
<hr/>		
35 each	\$1000	\$35,000.00

Kansas City Terminal Railroad Co. First Mortgage		
4% bonds, dated January 3, 1910, due January 1,		
1960, Numbers 39437 to 39486 inclusive,		
50 each	\$1000	\$50,000.00

Lexington & Eastern Railway Co. First Mortgage		
5% bonds, dated April 1, 1915, due April 1,		
1965,		
50 each	\$1000	\$50,000.00

Chicago, Milwaukee & St. Paul Ry. Co. General		
and Refunding Mortgage Gold 5% bonds, dated		
February 1, 1915, due February 1, 2014,		
104 each	\$1000	\$104,000.00

Indianapolis Union Railway General & Refunding		
Mortgage, Series A. 5% Gold Bonds, dated January		
1, 1915, due January 1, 1965,		
50 each	\$1000	\$50,000.00

Plaintiff's Exhibits.

McGavock & Mt. Vernon Horse Railroad Co.
 (700 M Issue) 6% bonds, dated July 1, 1887,
 due July 1, 1937, Numbers 249, 251, 303, 529, 574, 575,
 630, 638, 654, 657, 663, 668, 671
 13 each \$1000 \$13,000.00

Nashville Ry. & Light Co. Refunding & Extension
 Mortgage 5% bonds, dated July 1, 1908,
 due July 1, 1958,
 59 numbers 4242 to 4300 inclusive
 13 " 4450 " 4462 "
 15 " 4636 " 4650 "
 40 " 4671 to 4710 "
 1 " 4896

128 each \$1000 \$128,000.00

Nashville Railway & Light Co. First Consolidated
 Mortgage 5% bonds, dated January 1, 1895,
 due 1953, Numbers,
 25—563 to 587 inclusive,
 6—2597, 2599, 2680, 2681, 2682, 2714
 5—2731 to 2735 inclusive
 2—2884 to 2885 inclusive
 9—2963 to 2971 "
 6—2991, 3089, 3090, 3091, 3092, 3093,
 7—3253, 3254, 3255, 3256, 3257, 3350, 3354,
 14—3366 to 3379 inclusive
 5—4388, 3590, 3591, 3592, 3593,
 7—3640 to 3646 inclusive
 10—3369 to 3678 "
 9—3766, 3767, 3839, 3840, 3841, 3842, 3843, 3846, 3847,
 20—3950 to 3969 inclusive
 2—3983 to 3984 "
 8—4166 to 4170 and 4172 to 4174 inclusive
 10—4228 to 4237 inclusive
 7—4449, 4591, 4604, 4656, 4657, 4658, 4659,
 5—5166 to 5170 inclusive
 15—5261 to 5275 "
 25—5286 to 5310 "
 32—5562 to 5593 "

229 each \$1000 \$229,000.00

Plaintiff's Exhibits.

Cumberland Telephone & Telegraph Co. First and General Mortgage 5% bonds, dated January 1, 1912, due January 1, 1937, Numbers 4709 to 4931 inclusive, and Number 5160,
 224 each \$1000 \$224,000.00.

Illinois Central Railroad and Chicago, St. Louis and New Orleans Railroad Joint 5% bonds, dated December 1, 1914, due December 1, 1963,

3 numbers 15148 to 15150 inclusive

17 " 15464 to 15480 "

6 " 16395 to 16400 "

6 " 16660 to 16665 "

34 " 17601 to 17634 "

1 " 17640

50 " 22401 to 22450 "

117 each \$1000 \$117,000.00

To Hold, Manage, Preserve and Control the said trust estate; to collect, receive and receipt for all income therefrom and the principal thereof as the same should be paid, and to give full receipt and acquittance therefor; and

II. To invest and reinvest the principal thereof from time to time available for investment, in such securities and properties as to it (the said Company) in the exercise of its discretion and judgment may seem proper; and in such investment and reinvestment The Company is hereby expressly authorized to purchase securities from and owned by the Detroit Company at prevailing market prices, that is, at the prices at which such securities from time to time are sold to its customers; and The Company shall not be responsible for loss occasioned by depreciation in the value of any investments so made; but in the sale, substitution or other disposition, investment and reinvestment of said trust estate, it is understood and agreed that the approval thereof in writing by Victor E. Shwab and George A. Shwab of Nashville, Tennessee, or the survivor of them, if one shall die, shall, during their lives, or the life of the survivor, first be obtained; and

It is further understood and agreed that during the life of Victor E. Shwab, he, the said Victor E. Shwab, shall have, and by Mrs. Dickel is hereby expressly given the right and authority to demand in writing a sale by the Company of any part, or all, of the securities or properties in which said trust estate is now or at any time dur-

Plaintiff's Exhibits.

ing his (Victor S. Shwab's) life may be invested, and upon such demand the Company agrees forthwith, or as soon as practicable thereafter, to sell the securities or properties so demanded to be sold—such sale or sales so made, as well as any sales or exchanges at any time made, by the Company hereunder, to be made at current market prices. Any sale made as above under demand of Victor E. Shwab shall be without liability or responsibility on the part of the Company.

It is understood and agreed further that during the life of Victor E. Shwab he shall have, and is hereby expressly given the right and authority, to select the securities and properties for exchange, substitution and re-investment of any of said trust estate available for re-investment herein, and his selection thereof shall be without liability or responsibility whatsoever to The Company. The Company agrees to purchase or exchange any such securities or properties so selected by Victor E. Shwab.

III. The Company is further authorized to take any action by legal proceedings or otherwise which in its discretion and judgment may be expedient and necessary properly to protect and conserve said trust estate and the interests confided to it hereunder, and to this end to employ counsel and to incur such expenses and costs and to make such disbursements as the said Company may deem proper. The Company is also authorized to pay all taxes, assessments, governmental charges and expenses upon said trust estate or the income therefrom or against The Company in connection therewith.

IV. It is mutually agreed that the net income (hereinafter defined) shall be remitted and paid as follows; to the said Victor E. Shwab or on his written order in semi-annual installments for and during the term of his natural life, and on the death of Victor E. Shwab the net income to be paid him as herein provided (or to the proper representatives of his estate) shall include not only the net income at the date thereof actually collected and on hand but also the net income on said trust fund accrued to said date but not actually collected.

After the death of Victor E. Shwab this trust shall continue during the lives of the six following named persons (hereinafter referred to as the "Beneficiaries") and during the life of the last survivor of them. While this trust shall continue as stated, the net income, after the death of Victor E. Shwab, shall be paid the said Beneficiaries during their lives respectively, and in equal

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shares. Said six Beneficiaries who participate in the income are as follows:

Mrs. Louise Lindenberg, wife of Otto H. Lindenberg,
Mrs. Augusta S. Davis, wife of Paul M. Davis,
Mrs. Elizabeth ("Bessie") S. Tate, wife of Benjamin E. Tate,
Felix E. Shwab,
Hugh M. Shwab, and
J. Buist Shwab.

Upon the death of any of said Beneficiaries with issue her or him then surviving, the share of the net income payable to said Beneficiary had he not died, shall be paid to such issue per stirpes. Upon the death of any of said beneficiaries without issue her or him then surviving, the share of the net income payable to said Beneficiary had he or she not died, shall be divided among and be paid in equal shares to the surviving Beneficiaries and per stirpes to the issue surviving of any deceased Beneficiary.

Upon the death of any of said Beneficiaries and upon the death of the issue of any such deceased Beneficiary, should there be surviving issue of the issue of such deceased Beneficiary, the share of the net income payable to the issue of such deceased Beneficiary, should such issue not have died, shall be payable per stirpes to the surviving issue of the issue of such deceased Beneficiaries.

Upon the death of any Beneficiary without issue her or him surviving, and without issue of such issue then surviving, the representative share of such net income shall be divided among and be paid in equal shares to the surviving Beneficiaries and per stirpes to the surviving issue or the surviving issue of such issue of deceased Beneficiaries.

V. After the death of Victor E. Shwab and of the last survivor of said six Beneficiaries, to pay over, transfer and convey the trust fund (corpus and accrued income) to the children of said Beneficiaries then living per stirpes, and in the event there be grandchildren of a child (then dead) of any Beneficiary, such grandchild or grandchildren shall as a class represent their parent and take as a class the share he or she would have taken if then alive; provided, however, that if the issue (children and grandchildren) of any of said six Beneficiaries shall then be extinct, the share or portion of said fund which such issue living would have taken, shall be shared in and an equal portion or share thereof be paid over and transferred to George A. Shwab, son of said Victor E.

Plaintiff's Exhibits.

Shwab, if then living, or to his issue if he be then dead, in the same manner as to said lapsed share or shares, and upon the same terms as if George A. Schwab had been named as one of the Beneficiaries in the first instance.

VI. The Company shall be entitled to full receipts and releases upon said division and payment.

VII. By the term "net income" in this agreement referred to, is meant the gross income collected hereunder, less all taxes, assessments, charges, fees and necessary incidental expenses and costs incurred or paid by The Company in respect to said trust estate or income.

It is hereby understood and agreed that premiums on all bonds and securities, and all profits derived from the sale or other disposition of any of the securities or properties held at any time hereunder shall be treated as principal and not income and added to and become a part of the corpus of said trust estate.

VIII. It is mutually agreed that The Company, without liability to itself, may hold as investments herein, until directed by Victor E. Schwab to sell as is herein provided may be done, any securities in which said trust estate is now invested, The Company shall not in any wise be responsible for the application or uses by any payee mentioned herein of any of the net income or principal paid over by The Company pursuant to this agreement.

IX. The Company shall receive for its ordinary services hereunder a sum equal to five per cent. of the gross income collected by it or accrued to date of the termination of this agreement, payable as remittances of income are made, and also reasonable additional compensation for extraordinary services that may be required—any such additional compensation shall during the life of Victor E. Schwab be subject to his approval and after his death subject to the approval of said George A. Schwab.

X. This agreement shall be subject to termination at any time by Victor E. Schwab and George A. Schwab during the lives of both, or by the survivor of them during his life, by reasonable written notice of such determination addressed to the Detroit Trust Company at Detroit, Michigan. Upon receipt of such notice The Company agrees to take steps forthwith to terminate said trust and deliver over to its successor in trust the said estate and properties as soon as practicable.

The Company also shall have the right at any time during the lives of Victor E. Schwab and George A. Schwab, or during the life of the survivor of them should one die, to terminate the said trust by reasonable writ-

Plaintiff's Exhibits.

ten notice to either Victor E. Shwab or George A. Shwab, addressed to them at Nashville, Tennessee.

XI. Victor E. Shwab and George A. Shwab during their lives, and the survivor of them, shall have and is hereby vested by Mrs. Dickel with power and authority, upon the termination of this agreement by notice aforesaid, to select and appoint a successor to The Company in its place and stead, such successor to be a Trust Company or other corporation organized under the laws of any state. Upon any such termination of this agreement and the appointment of a successor to The Company, as provided, The Company agrees to account for and pay over and deliver to such successor all the trust estate and properties then in its hands, and upon said transfer the new trustee so appointed shall have authority to receipt to The Company for the securities and properties so transferred to it, and upon proper accounting shall release and discharge the Detroit Trust Company from all responsibility and liability for said estate.

XII. During the life of Victor E. Shwab, The Company agrees to account to him annually, or semi-annually if requested, showing all receipts and disbursements of The Company of said trust funds. Likewise The Company agrees to account to George A. Shwab during his life should he survive Victor E. Shwab. After the death of both Victor E. Shwab and George A. Shwab The Company agrees to render accounts to each and every of the Beneficiaries surviving so long as this trust shall continue.

XIII. Mrs. Dickel may at any time add to and increase the said trust fund by future additions, in which event all such securities and property shall become a part of the fund covered by this trust, subject to all the conditions, limitations and covenants herein contained the same as if now included herein.

In witness whereof, Mrs. Dickel has hereunto subscribed her name, and The Company has caused its name to be subscribed and its seal to be affixed to this instrument executed in duplicate original, on this the day and date above written.

(Signed) Augusta Dickel.

[Seal.]

Detroit Trust Company.

By Ralph Stone, Vice-President.

By Chas. P. Spicer, Secretary.

State of Tennessee, Davidson County.

On this the 22nd day of April, A. D. 1915, before me personally appeared Augusta Dickel (widow) to me

Plaintiff's Exhibits.

known to be the person described in, and who executed, the foregoing instrument, and acknowledged that she executed the same as her free act and deed, for the purposes and intents therein expressed.

Witness my hand and seal of office at my office in said County on this the day and date above written.

(Seal)

R. P. Lawrence,

Notary Public for Davidson County, Tennessee.

State of Michigan, Wayne County, ss.:

On this day the 3rd day of June, 1915, before me appeared Ralph Stone and Chas. P. Spicer, to me personally known, who being by me duly severally sworn, did say that they are respectively Vice President and Secretary of the Detroit Trust Company of Detroit, Michigan, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that they signed and sealed said instrument on behalf of said corporation, with authority so to do, and by authority of its board of directors, and said Ralph Stone and Chas. P. Spicer acknowledge said instrument to be the free act and deed of said corporation.

Witness my hand and seal of office at my office in said County on this the day and date above written.

(Seal) Louis S. Dudley,

Notary Public for Wayne County, Michigan.

My commission expires March 22d, 1919.

It is understood that the schedule of securities in the within agreement is hereby amended to cover the following changes in the bonds assigned to and deposited with Detroit Trust Company thereunder, viz.:

Instead of Two Hundred twenty-four thousand and no/100 (\$224,000.00) Dollars par value of Cumberland Telephone & Telegraph Company first and general mortgage 5% bonds, as described in the agreement, there has been assigned and delivered to Detroit Trust Company, to be included in said agreement only One Hundred seventy-four Thousand and no/100 (\$174,000.00) Dollars par value of said bonds, being a difference of Fifty Thousand and no/100 (\$50,000.00) par value.

In lieu of said Fifty Thousand and no/100 (\$50,000.00) Dollars of bonds, there have been assigned to and received by Detroit Trust Company to be held under the terms of said agreement, Fifty Thousand and no/100 (\$50,000.00) Dollars par value 5% per cent Commonwealth-Edison Company bonds, dated the 1st day of September, 1908, maturing the 1st day of June, 1943; bear-

Plaintiff's Exhibits.

ing September 1st, 1915, and subsequent coupons. Numbers 25713, 33202/17, 33221/3, 33225/35, 34361/73, 34571/2, 34956, 35079/80, 35171. Par value \$1000.00 each. Total par value \$50,000.00.

(Seal) Augusta Dickel (L. S.)

Detroit Trust Company.

By Ralph Stone, Vice-President.

By Chas. P. Spicer, Secretary.

Plaintiff's Exhibit "F."

Voucher Entry No. 53343. Detroit Trust Company,
Trust No. 1344. Trustee, Augusta Dickel.

Trust Voucher No. To Continental & Commercial National Bank,
Date Oct. 6, 1915. Address, Chicago, Ill.

Item.	Amount.
Payment of sight draft, dated Oct. 4, 1915, drawn by Mr. V. E. Shwab in favor of the Fourth & First National Bank of Nashville, Tenn., on Detroit Trust Co.....	\$17,000.00
Received of Detroit Trust Com- pany, Trustee, Seventeen Thousand and no/100 Dol- lars of the above account.	Above account exam- ined, found correct. F. H. Gay.
Continental and Commercial National Bank of Chicago.	Approved for payment. Chas. P. Spicer, Sec.
G. T. Smith, Asst. Cashier.	Mail.

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Note: The above receipt must be dated and signed by the party in whose favor the voucher is made or when signed by another party the authority for so doing must in all cases accompany it. Return at once in inclosed envelope to Detroit Trust Company, Detroit, Mich.

Attached to above voucher there was a sight draft, as follows:

\$17,000.00. Nashville, Tenn., Oct. 4, 1915. 190

At sight pay to the order of Fourth & First National Bank Seventeen thousand and no/100 Dollars.

Value Received and charge the same to account of

V. E. Shwab.

To Detroit Trust Co.,
Detroit, Mich.

Plaintiff's Exhibits.

No. _____

Endorsed: Paid Oct. 6, 1915, Detroit Trust Company.
 Voucher Entry No. 53636. Detroit Trust Company,
 Trust No. 1344 Trustee, Augusta Dickel.
 Trust Voucher No. To Victor A. Shwab, care
 Date Oct. 21, 1915. George A. Dickel Co.
 Address Nashville, Tenn. Dr.

Item	Amount
Remittance of net income on hand Oct. 21, 1915.	\$1537.44
Received of Detroit Trust Com- pany, Trustee, Fifteen Hun- dred Thirty-seven and 44/ 100 Dollars in full of the above account.	Above account exam- ined, found correct. F. H. Gay. Approved for payment. F. J. McGavin, V. E. Shwab. Asst. Sec.
Dated Oct. 25, 1915.	Mail.

Note: The above receipt must be dated and signed by the party in whose favor the voucher is made, or when signed by another party the authority for so doing must in all cases accompany it. Return at once in inclosed envelope to Detroit Trust Company, Detroit, Mich.

Exhibit F in addition to the two vouchers above set forth, was composed of twelve other vouchers of substantially the same form as the above voucher of date October 21, 1915, each of which vouchers was receipted in the name of V. E. Shwab. The dates and amounts of said additional twelve vouchers are as follows:

February 2, 1916.....	\$21,199.25
April 21, 1916.....	2,185.37
September 27, 1916.....	22,622.00
October 21, 1916.....	1,200.00
January 8, 1917.....	19,300.49
April 21, 1917.....	5,119.21
October 20, 1917.....	23,650.38
March 11, 1918.....	22,622.40
July 8, 1918.....	19,526.40
October 21, 1918.....	5,496.00
January 21, 1919.....	18,326.01
April 21, 1919.....	5,537.68

Plaintiff's Exhibit "G."
 Nashville, Tennessee, January 26th, 1914.
 Messrs. Travis, Merrick & Warner,
 Attorneys at Law,
 Grand Rapids, Mich.

Gentlemen:

I have a client of this city who has spent several summers in Michigan and thinks seriously of making that state her home, and at an early day. She is a woman of means and desires to know something of your tax laws before changing her residence.

Be so kind as to advise me as to them. That is to say, the rate of taxation at present, how it is laid on real property and personal property, bonds, stocks, etc., and if a trust were created, what would be the tax if that trust was of personal property or bonds. Be so kind as to give me the information in detail, with a statement of your bill therefor.

We have been referred to you by Mr. C. H. Hollister of the Old National Bank.

Yours respectfully,
 (Signed) John J. Vertrees.

JJV/DC

Plaintiff's Exhibit "H."

Travis, Merrick & Warner,
 Grand Rapids, Mich.,
 February 11, 1914.

John J. Vertrees, Attorney,
 Nashville, Tenn.

Dear Sir:

Further replying to your recent inquiry about the tax laws of Michigan, would say that in this state taxable real and personal property is supposed to be assessed at its fair value, although in practice this is not actually done, the actual percentage for which property is assessed differing somewhat in different localities. However, the recent tendency has been to crowd the assessments up so that we presume in Grand Rapids the average might be seventy-five per cent of the actual value. In this city taxes are payable twice a year—in July and January; and the aggregate of the two assessments, or the total assessment for general taxes in one year is approximately two per cent. on the assessed valuation.

With the exception of unimportant exemptions, all personal property is assessable, including any indebtedness which may be owing to the taxpayer whether in the form of bonds, accounts or otherwise, but as against re-

Plaintiff's Exhibits.

ceivables the taxpayer is permitted to offset his indebtedness but indebtedness cannot be offset against tangible property. In this connection we may also mention that recently laws have been passed whereby bonds secured by a recorded mortgage, whether in Michigan or elsewhere, may be made exempt for general taxation by paying one-half of one per cent. thereon. In the case of Michigan mortgages this payment is made at the time the mortgage is recorded and thereafter the indebtedness secured by the mortgage is exempt from taxation. In the case of bonds or other obligations secured by any form of real estate mortgage covering property located in some other jurisdiction, the particular bonds held by a resident of Michigan can be made exempt by going to one of our county offices, making declaration of such ownership and paying this tax.

Stocks in foreign corporations held by residents of this state are taxable, although in practice many of such stocks are not assessed. The same thing is true of the stock of domestic corporations where the entire property of the corporation is located outside of Michigan and not assessed in this state, although in practice stocks of this character are seldom assessed.

Taxpayers are required by law to make an annual statement of their taxable properties. This law has not been strictly enforced until recent years, but there is a constant tendency to enforce the same in the large cities. Our impression is that in the smaller towns and rural districts the law is not enforced.

The assessments are made up in the spring of the year—usually as of the first Monday in April, although in Grand Rapids the assessment is made up about a month earlier than that.

The general tax rate would probably not vary greatly throughout the state, although we know of some localities in which the rate is considerable higher than Grand Rapids and somewhere it is slightly lower.

We do not know as we understand just what you meant in regard to the tax where a trust is created. Generally speaking property held by a trustee is subject to the same taxation as though held by an individual. You may have had something else than this in mind and if so, we would be pleased to have you state more definitely just what your idea was.

Our tax laws are published in pamphlet form, but we do not happen to have a recent pamphlet in our office.

Plaintiff's Exhibits.

We are, however, today requesting the Secretary of State to mail you one of the most recent publications, from which you will get a more comprehensive idea as to the character of property which is assessable, etc.

We regret that reply to your letter has been somewhat delayed, owing to our working shorthanded and being extremely crowded in this office during the past two or three weeks. We shall be glad to furnish you further information as you may request. This letter has been somewhat hastily written today at the request of Mr. Hollister, who had a telephone communication today, as we understand it from the party in whose interest you wrote. One member of our firm is in New York City on business and another out of town trying a lawsuit, and the latter had given this matter some thought and had intended to write you as soon as he gets out of court.

Yours very truly,

(Signed) Travis, Merrick & Warner.

PHT-F

Plaintiff's Exhibit "I."

Fidelity and Columbia Trust Company,
Louisville, Ky., March 12, 1914.

Mr. Paul M. Davis,
Nashville, Tenn.

Dear Sir:

Referring to our conference today, beg to advise that if we were made the Trustee under the deed of trust covering property to the value of seven or eight hundred thousand dollars, the income from which to be paid to certain beneficiaries, we would charge a fee of 4% on the income received.

Yours truly,

L. W. Bates,
Vice-President.

Plaintiff's Exhibit "J."

C. H. Stearns, Attorney at Law,
Kalamazoo, Mich.

July 9, 1914.

Otto H. Lindenberg, Esq.,
Charlevoix, Michigan.
Cottage 204, Bellvedere.

Dear Sir:

Pursuant to the request of Mr. Sam N. Bickerstaff of this city, I beg to advise you that Act No. 142 of the Public Acts for the year 1913 provides for the payment of

Plaintiff's Exhibits.

a specific tax of one-half of one per cent. of the face value of secured debts, whether secured by mortgage or deed of trust of real or personal property, or both, which mortgage or deed of trust is recorded in some place outside of the State of Michigan.

Only a resident of the State of Michigan can take advantage of the statutory provision.

I quote from the Act such sections thereof as are material to your inquiry, to wit:

Sec. 2. Any person may take or send to the office of the Treasurer of the county where he resides any secured debt or a description of the same, and may pay to the county a tax of one-half per centum on the face value thereof, and the treasurer shall thereupon make an endorsement upon said secured debt or shall give a receipt for the tax thereon, describing said secured debt and certifying that the same is exempt from taxation, which endorsement or receipt shall be duly signed and dated by the treasurer or his duly authorized representative. The treasurer shall keep a record of such endorsements and receipts with a description of such secured debt, together with the name and address of the person presenting the same and the date of registration.

Sec. 4. Secured debts upon which said specific tax shall be paid, shall be exempt from further general taxes under the laws of this State.

Section 1 of the above act merely defines the term "secured debts and goes to the extent of holding that any bond, note or other debt secured by mortgage, deed of trust, etc., shall come within the meaning of the term "secured debts." Sec. 3 of the Act provides for disposition of the moneys collected by the County Treasurer, and Sec. 5, which is the last section of the Act, provides for repeal of acts in contravention of the provisions of this act.

I am sending this letter by special delivery and pursuant to Mr. Bickerstaff's request, am enclosing a bill for two dollars to cover the service.

Very respectfully yours,

C. H. Stearns.

Plaintiff's Exhibit "K."

Lisle Shanahan,
Charlevoix, Mich.

July 27, 1914.

Mr. Shwab, Belvedere Resort, Charlevoix, Mich.

Dear Sir: You asked for an opinion on Act No. 142

Plaintiff's Exhibits.

of Public Acts of 1913 relative to the payment of the specific tax upon secured debts which are secured by personal property or real property located in some other state than Michigan.

All debts secured by mortgage on real property or by deeds of trust, mortgages of real or personal property, or both, which mortgages and deeds of trust are recorded outside of the State of Michigan, may be presented to the Treasurer of the County in which the holder resides and pay the specific tax of one-half per centum on the face value thereof, and be relieved from any further taxes. As regards to bonds of cities, counties or states outside of the State of Michigan, as to whether or not these bonds were exempted and would come under this act. As a rule state, county or city bonds are not secured by a real estate mortgage, however, some of the states do secure municipal bonds in this way and any state that secures its state, county or city bonds with a real estate mortgage or a mortgage on personal property or a deed of trust, then in that case these bonds would come under the provisions of Act No. 142 and upon your paying the specific tax of one-half percentum on the face value, you would be relieved from any further tax.

I do not know the nature of your municipal bonds so cannot state whether or not they are the kind secured by a mortgage, and in your particular case cannot state whether or not you can pay this specific tax, however, you no doubt know the nature of the bonds you hold and can decide this for yourself.

On July 17th I wrote the Auditor General of the State of Michigan, also the Attorney General, in regard to this Act, and have received a letter from each, a copy of which is hereto attached for your benefit.

Respectfully yours,

(Signed) Lisle Shanahan.

Plaintiff's Exhibit "L."

July 20, 1914.

Mr. Lisle Shanahan, Charlevoix, Michigan.

Dear Sir: We acknowledge receipt of yours of July 17th in re Act 142, Public Acts of 1913.

The Attorney General in construing this act, has held that it does not exempt bonds of municipalities located in some other State of county other than the State of

Plaintiff's Exhibits.

Michigan. This holding is based on the proposition that such bonds are not secured by mortgages.

Yours very truly,

(Signed) O. B. Fuller,

Auditor General.

By Geo. L. Hauser, Deputy.

Plaintiff's Exhibit "M."

July 22, 1914.

Mr. Lisle Shanahan, Attorney at Law, Charlevoix, Mich.

Dear Sir: Your letter of recent date has been received and contents noted. You have asked for my opinion as to whether or not municipal bonds issued in some other state of the Union may be exempted from taxation under the general law in the hands of a resident of Michigan, upon payment of the specific tax provided by Act 142 of the Public Act of 1913. In reply, I would say that the enactment referred to embraces secured debts only, that is bonds, notes, or other written or printed obligations secured by a mortgage or deed of trust, of real or personal property, where the mortgage is recorded in some other state and not recorded in Michigan, or such obligations secured by a deposit of collateral security under a written agreement held by a trustee. Generally speaking, of course, a municipal bond is not secured in the way contemplated by this Act, consequently it cannot be exempted from taxation under the general law under the provisions of Act 142. If, however, as is the practice in one or two states a municipal bond is so secured, no objection suggests itself to me that would operate to prevent the payment of the specific tax and the securing of a consequent further exemption from taxation under the general law.

Respectfully yours,

(Signed) Grant Fellows,

Attorney General.

Plaintiff's Exhibit "N."

I, Augusta Dickel, unmarried, widow of the late George A. Dickel, deceased, and a citizen of Charlevoix County, State of Michigan, do make and publish this my last will and testament, hereby revoking and making void all other wills by me heretofore at any time made, namely:

Item 1. I will and direct that all my just debts be paid; and

Item 2. I give and bequeath all my household and kitchen furniture, plate, china, bric-a-brac, articles of

Plaintiff's Exhibits.

virtu, books, jewels, jewelry, wearing apparel, personal ornaments, mementoes, etc., to my sister, Emma B. Shwab, wife of Victor E. Shwab, absolutely, to her sole, separate and exclusive use, free from the liability, control, and marital rights of her husband, or any husband she may have, if she be living at my death—otherwise as hereinafter provided.

Item 3. I give and bequeath to my nephews and nieces, the children of said Emma B. Shwab and Victor E. Shwab, to wit, Felix E. Shwab, George A. Shwab, J. Buist Shwab, Hugh M. Shwab, Anna Louise Shwab Lindenberg, Augusta D. Davis, and Elizabeth D. Tate, the sum of five thousand dollars each; and if any of said seven children shall have predeceased me, leaving issue at my death surviving, such issue, child or children, shall represent its or their deceased parent and take the said sum of five thousand dollars that the parent would have taken if then living; and

Item 4. I am a member of the firm of George A. Dickel & Company, but have had no part in conducting its affairs. I have entrusted the matter exclusively to my partners. In the event of my death before the death of my partner and brother-in-law, V. E. Shwab, I will and direct that the business of the partnership shall be wound up and settled, or it shall continue as heretofore, accordingly as V. E. Shwab shall decide and determine. If he decides to continue the business, my share as partner of the capital shall remain and continue therein as before, without responsibility on the part of either of my partners to my estate for the loss thereof, should loss at any time occur, and it shall continue therein as long as V. E. Shwab shall deem it advisable for it to remain therein.

Item 5. I have a valuable estate, and no near relatives other than my sister Emma B. Shwab and her children, and they are all dear to me. I wish them to receive and enjoy the benefit of my estate. My brother-in-law, Victor Emanuel Shwab, and I have long been jointly interested in business affairs, and I have great confidence in him and in his judgment. He and his wife, my sister Emma, and I have considered the disposition of our estates and agreed as to what under all the circumstances will be best for those for whom it is our desire to provide. Accordingly, and to that end, I give and bequeath, and will and devise, all of my property not hereinbefore disposed of, of every kind, wherever situated, real, personal and mixed, to my brother-in-law,

Plaintiff's Exhibits.

Victor Emanuel Shwab of Davidson County, Tennessee, absolutely. My sister will understand why it is I have bequeathed nothing to her. She has an abundance and well knows my affection for her, and that I have in contemplation that form of disposition of my estate which eventually will benefit those she lives so dearly—the children of her union with her husband, Mr. Shwab.

Item 6. I nominate and appoint Victor E. Shwab of Davidson County, Tennessee, to be the executor of this my will without bond.

In Witness Whereof I, Augusta Dickel, have hereunto set my hand to this my will on this 26th day of May, A. D. 1915.

Augusta Dickel.

Executed and published by the testatrix and witnessed by us at her request, in her presence, and in the presence of each other, on this the date above written.

Lon S. Hager,

John J. Vertrees,

(Miss) Maude Schell,

Witnesses.

Exhibit "N" included, in addition to the foregoing last will and testament of Augusta Dickel, deceased, the following:

(1) Letters testamentary issued October 17, 1916, by Servetus A. Correll, Judge of Probate, of the Probate Court for the County of Charlevoix, Michigan, appointing Victor E. Shwab, of Nashville, Tennessee, executor of the last will and testament of Augusta Dickel, deceased.

(2) Exemplification of record signed by said Servetus A. Correll, Judge of Probate of said Probate Court, certifying that the foregoing will of Augusta Dickel, deceased, and the foregoing letters testamentary are correct transcripts from the originals filed in said Probate Court.

Plaintiff's Exhibit "O."

Nashville, Tennessee, November 10, 1916.

Mr. E. J. Doyle,

Collector Int. Revenue,

Grand Rapids, Mich.

Dear Sir:

Enclosed you will find notice (Form 704) from me as executor of Mrs. Augusta Dickel, deceased, of Charlevoix, Mich.

In addition to the statements therein made I desire to

Plaintiff's Exhibits.

state that Mrs. Dickel died in September, 1916, after the passage of the "estate tax" act, but made a conveyance in trust on the 21st day of April, 1915, to the Detroit Trust Company. In the statement I herewith enclose I have not included the amount so conveyed in trust, although it was less than two years before her death.

Mrs. Dickel was a woman advanced in years—a childless widow, and sister to my wife. She resided in Tennessee, with my family, and had done so for years, and had her citizenship there until a few years before her death. I have attended to all her business affairs for years.

She made the deed of trust in April, 1915, for the benefit of myself for life and after my death for the benefit of six of my wife's, her sister's, children. This conveyance was not intended to take effect at her death, but at once, and did in fact take effect immediately. No interest of any kind was reserved to Mrs. Dickel, as you will see from the copy of the deed which I herewith enclose.

Moreover, Mrs. Dickel did not make this deed in contemplation of death. There was no thought of her dying at the time, or in the near future, and the attack which caused her death seized her only a short time prior to her death in September last.

I am advised also that this Act of Congress has no retroactive operation. For these reasons the bonds covered by the deed of trust should not be included. If you would like to have statements as to Mrs. Dickel's condition in April, 1915, and theretofore, I will be pleased to furnish you statement of the family physician.

Very respectfully,

(Signed) V. E. Shwab.

Plaintiff's Exhibit "P."
Treasury Department
Internal Revenue Service,

Grand Rapids, Mich., Nov. 16, 1916.

Mr. V. E. Shwab,
Nashville, Tenn.

Sir:

Form 704 and copy of conveyance in trust of certain property of Mrs. Augusta Dickel received.

For your information I am enclosing Regulations 37 which covers the requirements of the inheritance law in detail, and gives information regarding the execution of a schedule for taxation purposes. The tax is due one year after the decedent's death. If the tax is paid be-

Plaintiff's Exhibits.

fore it is due a discount at the rate of 5% per annum, calculated from the time of payment, is made to the date when tax is due, shall be deducted. See Section 204 of the law, a copy of which was sent you.

A Form 706 is being prepared for the purpose of report and are not in the printer's hands, but if you wish to take advantage of the discount allowed, you may make payment of tax based on an informal return at your convenience. This informal return must be filed in duplicate and show the gross estate computed in accordance with the provisions of Sec. 202, the separate deductions allowed under Sec. 203, and the resultant net estate. After the blank returns Form 706 are received, the estate will be required to execute a supplementary return on this form. If this final return shows that the tax has been overpaid a refunding claim may be filed in accordance with Sec. 207. If final return shows additional tax due, assessment of such additional tax will be made.

Respectfully,

(Signed) Emanuel J. Doyle,

Collector.

1 enclosure.

Plaintiff's Exhibit "Q."

December 14, 1917.

Emanuel J. Doyle, Esq.,

U. S. Collector of Internal Revenue,

Fourth Collection District of Michigan,

Grand Rapids, Mich.

Dear Sir:

As Executor of the last will and testament of Augusta Dickel, late of Charlevoix, Michigan, now deceased, I am in receipt of notice from you under date of December 7, 1917, that there has been assessed against the Augusta Dickel estate the sum of \$59,136.05 for additional estate tax, accompanied by your demand for the payment of said tax. I understand that from this sum it is your intention to deduct \$2,587.64 heretofore paid by me, thus leaving a balance of \$56,546.41, payment of which is demanded by you under threat of the imposition of the penalties and interest mentioned in your notice.

In behalf of the estate of Augusta Dickel, deceased, I therefore hand you herewith check for \$56,546.41, so demanded by you.

I make this payment to you under protest. It is my claim that the above mentioned additional estate tax in the sum of \$56,546.41 is not properly and legally assessable; that neither the estate of said Augusta Dickel, deceased, nor myself, as executor thereof, owes to the

Plaintiff's Exhibits.

United States the above mentioned sum of \$56,546.41, nor any other sum whatsoever; that, in behalf of the estate of said Augusta Dickel, deceased, I have already paid all estate taxes which are properly assessable against said estate; and in behalf of the estate of said Augusta Dickel, deceased, I, as executor of the last will and testament of said deceased, therefore ask and demand that the moneys herewith paid to you be refunded.

The grounds upon which I, as executor, as aforesaid, protest against the payment of said tax are the following:

First: The additional estate tax imposed upon the estate of Augusta Dickel, deceased, is not imposed upon the transfer of the net estate of said Augusta Dickel, who died on September 16, 1916, but the same is sought to be imposed upon a transfer of property made by Augusta Dickel to the Detroit Trust Company, Trustee, by instrument bearing date April 21, 1915, executed and acknowledged by said Augusta Dickel on April 22, 1915.

Second: The additional estate tax imposed upon the estate of Augusta Dickel is sought to be imposed upon said transfer of property made by Augusta Dickel to the Detroit Trust Company, Trustee, bearing date April 21, 1915, and said transfer was not made by said Augusta Dickel in contemplation of death.

Third: Said additional estate tax is sought to be imposed under the supposed authority of title II of an Act of the Congress of the United States, entitled "An Act to Increase the Revenue, and for Other Purposes," approved September 8, 1916, and said Act is not retrospective in character and does not authorize the imposition of an estate tax upon said transfer of property made in or about April of the year 1915, long prior to the passage of said Act of Congress.

Fourth: The transfer of property made by said Augusta Dickel to the Detroit Trust Company, Trustee, by instrument bearing date April 21, 1915, was made at a time when the above mentioned Act of Congress had not been proposed and was not contemplated and the transfer then made was not such a transfer as is embraced within the true intent and meaning of said Act of Congress, and was not in contemplation of death within the meaning of title II of said Act.

Fifth: Even if the Act of September 8th, 1916, be retroactive in character, and the transfer made to the Detroit Trust Company April 21st, 1915, be within its terms, in so far as it affects that transfer it is ineffectual and

Plaintiff's Exhibits.

void for that it is a denial of due process of law, and the taking of private property without compensation.

I, Victor E. Shwab, as Executor of the last will and testament of said Augusta Dickel, deceased, do, therefore, notify you that the above mentioned additional estate tax in the sum of \$56,546.41 is paid under protest that it is illegally exacted by you; that I contend that said additional estate tax is illegal and void; that I pay the same only because required by you to do so under threat of the imposition of penalties and interest; and that I intend to institute suit against you to compel the repayment of said tax.

This protest, now filed by me, will shortly be followed by a claim sworn to by me, for the refund of the above mentioned additional estate tax which I am now improperly forced to pay.

Yours, etc.,

(Signed) V. E. Shwab,

Executor of the last will and Testament of Augusta Dickel, deceased.

Plaintiff's Exhibit "R."

State of Tennessee, County of Davidson, ss.:

Victor E. Shwab, of the City of Nashville and state and county aforesaid, being duly sworn according to law, deposes and says that he is the Executor of the last will and testament of Augusta Dickel, late of Charlevoix, Michigan, now deceased; that he makes this claim in behalf of the estate of Augusta Dickel, deceased, and is properly authorized so to do; that upon the 7th day of December, 1917, the estate of said Augusta Dickel, deceased, was assessed an internal revenue tax of \$59,136.95, upon which there was allowed credit for a payment theretofore made in the sum of \$2,587.64, leaving the net amount of said internal revenue tax against said estate \$56,546.41, the same being an additional estate tax (so-called) imposed upon said estate; which amount this deponent, as Executor of the last will and testament of Augusta Dickel, deceased, afterwards and on the 15th day of December, A. D. 1917, acting in behalf of said estate, paid to Emanuel J. Doyle, Esq., Collector of Internal Revenue for the Fourth District of Michigan, and which amount, as this deponent verily believes, should be refunded, for the following reasons:

First: The additional estate tax imposed upon the estate of Augusta Dickel, deceased, is not imposed upon the transfer of the net estate of said Augusta Dickel, who

Plaintiff's Exhibits.

died on September 16, 1916, but the same is sought to be imposed upon a transfer of property made by Augusta Dickel to the Detroit Trust Company, Trustee, by instrument bearing date April 21, 1915, executed and acknowledged by said Augusta Dickel on April 22, 1915.

Second: The additional estate tax imposed upon the estate of Augusta Dickel is sought to be imposed upon said transfer of property made by Augusta Dickel to the Detroit Trust Company, Trustee, bearing date April 21, 1915, and said transfer was not made by said Augusta Dickel in contemplation of death.

Third: Said additional estate tax is sought to be imposed under the supposed authority of title II of an Act of the Congress of the United States, entitled "An Act to Increase the Revenue, and for Other Purposes," approved September 8, 1916, and said Act is not retrospective in character and does not authorize the imposition of an estate tax upon said transfer of property made in or about April of the year 1915, long prior to the passage of said Act of Congress.

Fourth: The transfer of property made by said Augusta Dickel to the Detroit Trust Company, Trustee, by instrument bearing date April 21, 1915, was made at a time when the above mentioned Act of Congress had not been proposed and was not contemplated and the transfer then made was not such a transfer as is embraced within the true intent and meaning of said Act of Congress, and was not in contemplation of death within the meaning of title II of said Act.

Fifth: Even if the Act of September 8th, 1916, be retroactive in character, and the transfer made to the Detroit Trust Company April 21st, 1915, be within its terms, in so far as it affects that transfer it is ineffectual and void for that it is a denial of due process of law, and the taking of private property without compensation.

And this deponent, as Executor of the last will and testament of Augusta Dickel, deceased, acting in behalf of said estate, now claims that, by reason of the payment of said sum of \$56,546.41, he is justly entitled to have the said sum of \$56,546.41 refunded, and he now asks and demands the same.

And this deponent further makes oath that neither the said claimant, Victor E. Shwab, as Executor of the last will and testament of Augusta Dickel, deceased, nor said Augusta Dickel Estate, is indebted to the United States in any amount whatever, and that no claim has hereto-

Plaintiff's Exhibits.

fore been presented for the refunding of the above amount, nor any part thereof.

(Signed) V. E. Shwab.

Subscribed and sworn to before me this 19th day of December, A. D. 1917.

(Seal) Paul M. Davis,

Notary Public in and for Davidson County, Tennessee.

My commission expires April 21, 1919.

Plaintiff's Exhibit "S."

Form 1-17. Notice and Demand for Tax and Receipt—Regular Taxes.

United States Internal Revenue.

Collector's Office, 4th District of Mich. List 23, 1917, Oct.

At Grand Rapids,

Date 12/7/17.

Notice is hereby given that there has been assessed against you the amount set opposite for the liability named, which tax is payable to me. Demand is made for the payment of said tax on or before the date given below. Failure to do so will cause a 5 per cent penalty to accrue with interest at 1 per cent per month from due date until paid.

Due date Dec. 17, 1917.

E. J. Doyle,

Collector Internal Revenue.

You have \$2587.64

on deposit here. Collector of Internal Revenue.

Augusta Dickel Estate,

Charlevoix, Mich.

This notice with attached copies must be presented at the time payment is tendered, and when properly stamped "paid" by the collector it becomes a receipt for taxes.

Plaintiff's Exhibit "T."

Exhibit "T" is on the same form as Exhibit "S" and is identical thereto, except that the words "Paid under

Year	Month	Folio	Line
Additional Estate Tax			
(Character of Tax or Liability)			
For period ended _____			
Taxes, Penalties, Etc.			
Amount of tax...\$59,136.00			
50 per cent penalty			
100 per cent penalty			
5 per cent penalty			
Total			
Received payment,			

Plaintiff's Exhibits.

Protest" are added and also the stamp "Collector's Office, Received Dec. 15, 1917, Emanuel J. Doyle, 4th Dist. Mich."

Plaintiff's Exhibit "U."

Original

Receipt for Advance Payments—Regular Taxes.

Treasury Department
U. S. Internal Revenue
Form 1.

Collector's Office 4th Dis- Form 56 1917 Oct.
trict of Mich.

At Grand Rapids Date Form 23
12-15-17

Paid under Protest

(Description of collection
same as in column 3, Form
58, for

Estate Tax

Augusta Dickel Estate,
Charlevoix, Mich.

unassessable items.)

\$59136.05

Received payment,
Collector's Office

Received Dec. 15, 1917.
4th Dist. Mich.

Collector of Internal Revenue.

Plaintiff's Exhibit "V."

Treasury Department

Washington, May 27, 1918.

Office of Commissioner of
Internal Revenue.

Address reply to

Commissioner of Internal Revenue
and refer to ET-MR-Cl. R.

Estate of Augusta Dickel 4th District of Michigan.

Mr. Victor E. Schwab, Executor,

Estate of Augusta Dickel,
Nashville, Tennessee.

Sir:

The claim filed by you as executor of the estate of Augusta Dickel for refund of \$56,546.41, tax collected under the Act of September 8, 1916, has been examined.

The claim arises in connection with a deed of trust under which a transfer was made by the decedent to the Detroit Trust Company, Detroit, Michigan, of securities

Plaintiff's Exhibits.

valued at \$975,000.00. Inasmuch as it appears from all the evidence that the transfer in this case was made by the decedent in contemplation of death within the meaning of Section 202, Paragraph B, of the Estate Tax Law, your claim is hereby rejected.

The receipt on Form No. 1 of payment of the tax, transmitted with your claim, is returned herewith.

Respectfully,

(Signed) Daniel C. Roper,
Commissioner.

Plaintiff's Exhibit "W."

Nashville, Tennessee,
June 18th, 1914.

Mr. V. E. Shwab,
Charlevoix, Mich.

Dear Mr. Shwab:

When I came to the actual preparation of a trust instrument for Mrs. Dickel, reflecting over the matter, I came to the conclusion that it would be better to draw it on somewhat different lines from those we discussed, and I have done so.

Your general idea was that the property should be conveyed to the Trust Company and George as co-trustee to pay over the interest to Mrs. Dickel for life and after her death to your six named children for life, and upon the death of the last of them the corpus of the fund to be divided amongst their children or issue, and that George should have the power to change the trustee at any time.

To have one trustee here and another there, and that one there to be the one that you really proposed to hold responsible, would practically result in having the Company to write to George for approval of everything they did, and under circumstances that would not enable him always to fully understand the true situation.

Moreover, if George were the trustee, by reason of the relationship, he would be constantly subjected to personal pressure by such of the children as might be unfortunate or extravagant, and thus oftentimes be made uncomfortable, when this foreign trust company would escape all that.

So, it occurred to me that under all the circumstances it would be better to have but one trustee, and that the Company; and that the power to remove the trustee and appoint another be vested in you and George, or the survivor; and also that the power of the trustee to sell

Plaintiff's Exhibits.

those particular bonds that Mrs. Dickel places in trust, should not be exercised without the consent of you and George, or the survivor.

I accordingly have drawn it on these lines for your consideration and Mrs. Dickel's, and if, after you have considered it, you wish it changed, of course it can be done.

There was another suggestion which occurred to me which I have not embodied in the draft, but I really believe it would be best, and that is this: as drawn, by reason of the failure of some of your six children to have children living when they die, it might happen on final distribution that there would only be one or two or three to take this large fund. On the other hand, of course, all of them may have children then living, and in that event even the suggestion would not have much weight.

George has been left altogether out of this deed. You have a large estate and Mrs. Dickel also has a large amount left. Now why would it not be well to put George and his children in with the others—that is, let Mrs. Dickel do it so that there will be no discrimination? I imagine George would not object to it, inasmuch as it is not his parent that is doing it, but his aunt, and that part of your estate which you mean for him you can give to George without any limitation.

Whatever may be your conclusion, I beg to impress upon Mrs. Dickel and you the importance of submitting the final draft of the instrument first to a competent attorney of Michigan for his opinion as to whether there are any limitations or conditions in the instrument which are in violation of or not lawful under the laws of Michigan; and when you have done this, if he suggests that there is, I will be pleased to take it up with him and have him cite me to the statute or case upon which he relies. After his opinion has been taken, it will then be necessary, of course, to submit the matter to the Trust Company, for there may be some provisions to which they object.

However, if the matter is attended to it will not take long to get it through.

It has rained and the weather is pleasant. I have been gratified at the favorable reports of Mrs. Shwab's improvement which have been received.

With the kindest regards, I am

Yours very truly,

JJV/DLC.

(Signed) John J. Vertrees.

Plaintiff's Exhibit "X."

Office of
Jesse Webb
Tax Assessor, Davidson County,
Nashville, Tenn.

Dear Sir:

Inclosed find blank Tax Schedule for Personal Property. Would thank you to fill out same and return to this office at once, so as to save you further annoyance.

The law provides in Section 12 of the Assessment Act of 1907 that if any taxpayer shall fail, neglect or refuse to fill out such Tax Schedule, with each question fully answered, sign, swear (or affirm) to the same, and return it to the office of the Tax Assessor, then the Assessor is compelled under the law to make an assessment against such taxpayer according to his best information and judgment.

If the taxpayer fails or neglects to come before the Assessor or before the Board of Equalization when in session and make a correct statement of his personalty, then the Assessment made by the Assessor shall be conclusive against the taxpayer, and such taxpayer shall be required to pay the taxes on said assessment.

Yours truly,

Jesse Webb, Tax Assessor.

Defendant's Exhibit "1."

Davidson County 21 Ward.....District
List of Personal Property.

Returned for State and County Taxation by
V. E. Shwab.

State what your personal property consists in, and the amount owned by you on the tenth day of January of this year, under the following items, to wit: (All personal property must be listed in detail, whether deposited, encumbered, or pledged as collateral, or loaned, whether here or elsewhere—Section 8.)

Amount
fixed by the
Assessor.

Amount.

1. What amount of notes, duebills, negotiable paper, and accounts on solvent parties, or parties believed to be solvent, and all other assets, including cash on hand or on deposit, or invested in any manner in this State or elsewhere?

\$———— \$20.00

Defendant's Exhibits.

You can not recover by suit this character of property unless listed for taxation.—Section 14.

2. What amount of bonds, stocks, or other like securities, other than such as are exempt from taxation by the laws of the United States? \$ _____ \$ _____

3. What amount of horses, mules, jacks, jennets, cattle, sheep, hogs, all kinds of live stock and fowls, etc.? \$ _____ \$ _____

_____ \$ _____ \$ _____

_____ \$ _____ \$ _____

_____ \$ _____ \$ _____

_____ \$ _____ \$ _____

4. What amount of carriages, buggies, automobiles, bicycles and all other wheeled vehicles? \$ _____ \$ _____

_____ \$ _____ \$ _____

_____ \$ _____ \$ _____

5. What amount of machinery, engines, presses, looms, steamboats \$21,000 \$ _____
and all tools and implements? \$ _____
Less \$ 1,000 \$ _____

_____ \$ _____ \$ _____

_____ \$ _____ \$ _____

6. What amount of watches, plate, jewelry, pianos, household and kitchen furniture, ornaments, books, and miscellaneous articles? \$ _____
How much insurance do you carry on Personal Property? \$ _____

7. What amount of income derived from United States Bonds, and all other stocks and bonds not taxed ad valorem? \$ _____ \$ _____

8. What amount of other Personal Property of any other character do you own? \$ _____ \$ _____

Defendant's Exhibits.

9. What does the personal property belonging to your wife or minor children consist of, and where is it located? Answer:

10. Are you acting in the capacity of Trustee, Guardian, Administrator, or Executor, or in any other fiduciary capacity? If so, for whom and where do the beneficiaries reside? Also give the amount of their personal property in your hands on the tenth of January, this year? Answer:

11. Have you conveyed, converted, or disposed of any property—personal, real or mixed—in any manner, or created any debt for the purpose of evading the provisions of this law, or affecting the value and amount of your taxable estate? Answer:

State what amount of personal property you own or control, according to the best of your knowledge and belief, and either send or mail this schedule, with the gross amount, to the Assessor at the Courthouse, whether the amount exceeds \$1000 or not. In every case the Assessor will deduct \$1000, the legal exemption, from the total amount of your personalty.

I _____ do hereby solemnly swear, or affirm, that the foregoing contains a full, true and correct statement of all the personal property I am interested in, own or control, regardless of exemption, and that I have truthfully answered all the foregoing ques-

Defendant's Exhibits.

tions to the best of my ability and belief, so help me God.

This _____ day of _____, 1914.
Sign here _____

Sworn to and subscribed before me.

Jesse Webb, Assessor.

N. B. Every item must be filled out in detail. We cannot duplicate last year's list.

Instructions to Assessors.

In case the taxpayer refuses or fails to swear to the schedule, so state on back of schedule; also giving manner of arriving at value.

For every taxpayer there must be filled out a schedule which shall be sworn to.

This schedule must be filled out either by the Assessor or by the taxpayer, and must be sworn to by the taxpayer or his agent, or such neighboring freeholder as the Assessor selects. The Assessor has nothing to do with the \$1,000 exemption, but values personality as if exemption did not exist.

Failure to comply is a misdemeanor; and false swearing is perjury. (See Section 12, page 133, Tax Digest.)

The values must be fixed by the Assessors.

Assessors must make report to the County Court Clerk on or before the first Monday in June.

Inquisitorial power given grand juries in cases where Assessors fail to do their duty, and, upon conviction, Assessors are fined and subject to suit on their official bond.

Do not assess any kind of railroad property.

Directions to Taxpayers.

Every taxpayer must give a complete description and list of his personal property and of all in which he is interested or over which he has control, and must swear to this.

Neither the Assessor nor the taxpayer has anything to do with the \$1,000 exemption; and if a taxpayer claims that he has less than \$1,000 personal property, that is no ground for not listing and swearing to his property, neither does it release the Assessor from liability for failure to furnish schedule.

Every taxpayer who refuses to give a correct list of property he owns, has an interest in, or controls, is guilty of a misdemeanor; and swearing to an imperfect or incorrect list is perjury.

Defendant's Exhibits.
State of Tennessee,
County of Davidson
191

List of Personal Property
of

Assessed for State and County Taxation.

Please fill out and return this blank to the County Assessor at the Courthouse.

Jesse Webb,
County Assessor.

Defendant's Exhibit "2,"

Office of
Tax Assessor, Davidson County,
Nashville, Tenn.

Nashville, Tenn., May 10, 1910.

Mr. V. E. Shwab:

In accordance with the requirements of Section 12, Acts 1907, I send you this notice.

Not having received your Tax Schedule of Personal Property for 1910, we have assessed you with \$20,000.00
Allowing you an exemption of..... 1,000.00

Making your assessments on Personal Property.....\$19,000.00

If this assessment is not correct, you will please call at the Tax Assessor's Office (Second Floor, Court House), and have the necessary correction made, otherwise this assessment will go before the Board of Equalization first Monday in June for their consideration. Their action will be final, and you will be compelled to pay the taxes on the above assessment.

Very respectfully,

Jno. E. Binns,
Tax Assessor, Davidson County.

Per _____,
Deputy Tax Collector.

Defendant's Exhibit "2" consisted also of five other notices identical in form to the above, except that the notices of May 20, 1913, May 20, 1915, and May 24, 1916, were signed by Jesse Webb, tax assessor, instead of John E. Binns, and except that the dates and amounts were as follows:

Certificate of the Court.

Date.	Net Assessment After Deduction of Exemption.
May 17, 1911.....	\$19,000
May 10, 1912.....	19,000
May 20, 1913.....	20,000
May 20, 1915.....	20,000
May 24, 1916.....	20,000

CERTIFICATE OF THE COURT.

I do hereby certify that the matters and things stated in the foregoing bill of exceptions not appearing on record in said cause, I, the District Judge who heard said cause, pursuant to the statutes and rules in such case made and provided, at the request of the attorneys for the plaintiff, have settled the foregoing bill of exceptions; and I do hereby certify that the said bill of exceptions contains the substance of all the testimony given on said trial which in any manner affects the exceptions therein entered.

And I do further certify that so far as said testimony is stated in the foregoing bill of exceptions by questions and answers, it is necessary to a full understanding of the questions of law thereby raised.

And I do further certify that the exhibits introduced in evidence on the trial of said cause are attached to said bill of exceptions and made a part thereof.

And I do further certify that this bill of exceptions was settled and signed by me within the time allowed by the orders of the court extending the time for settling said bill, which orders were based on stipulations of the attorneys for the respective parties.

And I do further certify that at the time the said bill of exceptions was presented to me, the attorneys for the

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plaintiff presented the assignments of error, in due form, which were duly filed and are hereto attached.

Dated October 8, 1919.

C. W. Sessions,
District Judge.

ASSIGNMENTS OF ERROR.

Now comes the plaintiff, by his attorneys, Butterfield, Keeney & Amberg, and says that in the record of the trial and of the proceedings in this cause in this court, and also in the giving of judgment therein and in the proceedings had in this court on the motion of said plaintiff for a new trial, there is manifest error in the following particulars, to-wit:

1. That the court erred in sustaining the objections of defendant and refusing to permit the following question to be put to the witness, Charles P. Spicer, on his direct examination:

“Q. Was there anything that occurred there, so far as you could judge from Mrs. Dickel’s appearance or actions, that led you to think that her death was in any wise impending at that time?”

2. That the court erred in sustaining the objections of defendant and refusing to permit the plaintiff to read in evidence from the direct testimony of the deposition of Miss Maude Schell, the following question and answer:

“Q. Was there anything especially depressing her? (Referring to Mrs. Augusta Dickel.)

“A. No.”

3. That the court erred in sustaining the motion of defendant and striking out the first part of the following answer in the direct testimony of the witness, Dr. William Alexander Oughterson:

“A. No., she (referring to Mrs. Dickel) never had any

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such thought, or if she did, she did not discuss it with me.

(Said answer being in response to the question "Did she at any time discuss with you the question of death or her apprehension about death being imminent, or having to go soon, or anything like that?")

4. That the Court erred in sustaining the objection of defendant and refusing to permit plaintiff to read in evidence from the redirect examination in the deposition of Dr. William Alexander Oughterson, the following question and answer:

"Q. I want to ask you a question that is somewhat hypothetical, with reference to old persons in general, and not Mrs. Dickel in particular. Is or is not this true: That very old person, or very old persons, if they are in reasonably good health, as the years go on, they really have less immediate apprehension or danger of a near death, or departure, than young persons do, if anything. The idea is this, to illustrate, a woman that has lived to be seventy years or eighty years, isn't it a peculiarity of those old people—

"A. Yes, they think they are going to live right on."

5. That the court erred in sustaining the objection of defendant and refusing to permit plaintiff to read in evidence from the redirect examination in the deposition of Dr. William Alexander Oughterson, the following question and answer:

"Q. They are not in fear of immediate or near death, at all?

"A. Yes, they take one extreme or the other, become very pessimistic and think they are going to die, or get on the other side and if everything is going well and nothing wrong, they see no reason why they should not live on indefinitely."

6. That the court erred in sustaining the objection of defendant and refusing to permit plaintiff to read in evidence from the redirect examination in the deposition of Dr. William Alexander Oughterson, the following question and answer:

"Q. Now, assuming that the particular individual I have in mind, I have asked you about, has reasonably good health and has no disease that is liable to carry them off, isn't it true they are liable to take the optimistic view of it?

"A. Yes."

7. That the court erred in sustaining the objection of

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defendant and refusing to permit plaintiff to read in evidence from the redirect examination in the deposition of Dr. William Alexander Oughterson, the following question and answer:

"Q. And isn't that very generally the case?

"A. Yes, we see some people that develop a case of a sort of neurasthenia, so that they are apprehensive of everything. And on the other side, they feel everything is well. Now, those are questions you could discuss, of course, almost indefinitely."

8. That the Court erred in sustaining the objections of defendant and striking out the following answer in the direct examination in the deposition of the witness, Lon S. Hager:

"A. Mrs. Shwab was in a very bad condition and they were trying to get away, and I understood they all made them together so they would not excite Mrs. Shwab."

(Said answer having been given in response to the question, "Do you know or did you hear it discussed why those three wills were executed at that time?")

9. That the court erred in sustaining the objections of defendant and refusing to permit the following question and answer from the direct testimony in the deposition of the witness, Lon S. Hager, to be read in evidence:

"Q. Do I understand you have this idea, that it was thought Mrs. Shwab ought to make a will, but if she was called on alone to do so, it would excite her?

"A. Yes, sir.

10. That the court erred in sustaining the objections of defendant and refusing to permit the following question and answer from the direct testimony in the deposition of the witness, Lon S. Hager, to be read in evidence:

"Q. But if the others made theirs at the same time, it would be just a general business proposition?

"A. Yes, sir."

11. That the court erred in sustaining the objections of defendant and refusing to permit the following question and answer from the direct testimony in the deposition of the witness, Lon S. Hager, to be read in evidence:

"Q. How long was that before they were to go away?

"A. It was not very long before we went. We went about the first of June."

12. That the court erred in sustaining the objections of defendant and refusing to permit the following question and answer from the direct testimony in the deposi-

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tion of the witness, Lon S. Hager, to be read in evidence:

"Q. So you say that it was a short time before that?

"A. Yes, sir."

13. That the court erred in sustaining the objections of defendant and refusing to permit the following question and answer from the direct testimony in the deposition of the witness, Lon S. Hager, to be read in evidence:

"Q. Prior to your going?

"A. Yes, sir."

14. That the court erred in sustaining the objections of defendant and refusing to permit the following question and answer from the direct testimony in the deposition of the witness, Lon S. Hager, to be read in evidence:

"Q. Were they, or not, apprehensive about her death? (Referring to Mrs. Shwab.)

"A. It was something they couldn't tell anything about, her condition."

15. That the court erred in sustaining the objections of defendant and refusing to permit to be read in evidence the following question and answer in the direct examination of the deposition of the witness, Victor Emanuel Shwab:

"Q. What did he report (referring to Mr. Spicer) as to his desire to proceed with the matter?

"A. He was very much pleased and said he was ready to go ahead with it."

16. That the court erred in sustaining the objections of defendant and refusing to permit to be read in evidence the following questions and answers of the direct testimony in the deposition of the witness, Victor Emanuel Shwab:

"Q. Did Mrs. Dickel, or any of you, have any idea or expectation that she was in danger of passing away in the near future?

"A. No, sir, you mean back in 1915?

"Q. Yes.

"A. No, not at all.

"Q. At any time in 1915?

"A. No."

17. That the court erred in granting the motion of defendant and striking out the following sentence in the direct testimony of the deposition of the witness, John Jacob Vertrees:

"At the same time, this deed of trust, as far as I knew or had any reason to believe, was not executed by reason

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of any apprehension or fear on her part of anything impending."

18. That the court erred in overruling the objections of plaintiff and in permitting the following question to be put in cross-examination to the witness, Victor Emanuel Shwab:

"Q. Up to that time—up to the creation of this trust instrument in April, 1915, and the turning over of this million dollars of bonds to the Detroit Trust Company under that instrument, what taxes had you, for Mrs. Dickel, or she herself, directly or indirectly, paid in Tennessee or anywhere else upon those bonds or holdings?"

19. That the court erred in taking the answers of said witness, Victor Emanuel Shwab, to the last question, and allowing them to stand:

20. That the court erred in overruling the objections of plaintiff and permitting the following question to be put in cross-examination to witness Victor Emanuel Shwab:

"Q. From the time the trust instrument was made, in April, 1915, or the securities delivered in June, I guess they were, because they were formally acknowledged in June, 1915, up to Mrs. Dickel's death, in September, 1916, where had you kept the income that you received from the Detroit Trust Company, where did you put it?"

21. That the court erred in taking the answers of said witness, Victor Emanuel Shwab, to the last question, and allowing them to stand.

22. That the court erred in overruling the objections of plaintiff and permitting the following question to be put in cross-examination to the witness V. E. Shwab.

"Q. I am speaking now of what took place between June or April, 1915, when the agreement was executed, and her death; is it not a fact that the income, the interest and income from those bonds and other securities, \$500,000, approximately, that you and she still owned jointly, was collected by you after the trust agreement was made, up to the time of her death, was put in the same account as the income you received from the Detroit Trust Company precisely; isn't that the fact?"

23. That the court erred in taking the answers of said witness V. E. Shwab to the last question and allowing them to stand.

24. That the court erred in overruling the objections of plaintiff and permitting the following question to be put to the witness V. E. Shwab in cross-examination:

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"Q. You do recall, do you not, though, that under that trust agreement, Mrs. Dickel reserved the income of this trust fund, this million dollars of bonds that she was turning over, to herself, for her lifetime, that she was to have the income for her lifetime; you recall that, don't you?"

25. That the court erred in taking the answer of said witness V. E. Shwab to the last question and allowing it to stand.

26. That the court erred in overruling the objections of plaintiff and permitting the following questions to be put in cross-examination of the witness V. E. Shwab:

"Q. Do you recall that you included in that return, as part of her income, the sum of 18,000 and some odd dollars, being the total amount that you had received from the Detroit Trust Company?"

"Q. Up to that time, as the income on these bonds, do you recall that?"

27. That the court erred in taking the answers of said witness V. E. Shwab to the last questions, and allowing them to stand.

28. That the court erred in overruling the objections of plaintiff to the acceptance in evidence of defendant's Exhibit "1."

29. That the court erred in overruling the objections of plaintiff to the acceptance in evidence of defendant's Exhibit "2."

30. That the court erred in overruling the objections of plaintiff and in receiving in evidence on the direct examination of the witness Hume Jones and other witnesses of defendant, testimony relating to notices, assessments, schedules and other matters pertaining to the assessment and payment of local taxes in Tennessee by Augusta Dickel, Victor E. Shwab and George A. Dickel & Company, and other testimony of a similar nature.

31. That the court erred in overruling the objections of plaintiff and in permitting the following question to be put on direct examination to the witness A. D. Bell:

"Q. What taxes did Augusta Dickel pay on personalty during those years?"

32. That the court erred in taking the answers of said witness A. D. Bell to the last question, and allowing them to stand.

33. That the court erred in overruling the objections of plaintiff and in receiving in evidence, on the examination of the witness A. D. Bell and other witnesses of de-

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defendant, testimony relating to the payment of taxes on personalty in Tennessee by Mrs. Augusta Dickel, Victor E. Shwab or George A. Dickel & Company during the years 1912 to 1916 inclusive.

34. That the court erred in overruling the objections of plaintiff and in permitting the following question to be put to the witness, Vernon H. Sharp, on direct examination:

“Q. I will ask you what personalty—I will ask you first, was Augusta Dickel assessed any personalty during any of those years 1912 to 1915, upon the city tax rolls or assessment rolls of the city of Nashville?”

35. That the court erred in taking the answers of said witness, Vernon H. Sharp, to the last question and allowing them to stand.

36. That the court erred in overruling the objections of plaintiff and permitting the following question to be put to the witness Vernon H. Sharp on direct examination:

“Q. Now, to return to the question I asked: Were George A. Dickel & Company assessed any personalty upon the assessment rolls of the city of Nashville from 1912 to 1916 inclusive, other than what is called the ad valorem assessment for the merchant stock?”

37. That the court erred in taking the answers of said witness, Vernon H. Sharp, to the last question and permitting them to stand.

38. That the court erred in sustaining the objection of defendant and in refusing to permit plaintiff to put the following question on cross-examination to the witness, Vernon H. Sharp:

“Q. You sent out, you say, about three thousand of those requests for return of personal property. In answer to those three thousand requests, how many returns of personal property for assessment did you get from these persons to whom these notices are sent?”

39. That the court erred in sustaining the objections of defendant and in refusing to permit plaintiff to put the following question on cross-examination to the witness G. A. Geer:

“Q. You also heard Dr. Armstrong say; did you not, upon his cross-examination by Mr. Walker, that he could not recollect that he had ever taken Mrs. Dickel's blood pressure at any time prior to this time when she had her seizure, shortly before her death?”

40. That the court erred in denying plaintiff's motion that a verdict be directed for the plaintiff.

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41. That the court erred in refusing to charge the jury as requested by the plaintiff, as follows:

"Upon the undisputed proofs, your verdict must be for the plaintiff in this cause."

The same being plaintiff's first request to charge.

42. That the court erred in refusing to charge the jury, as requested by the plaintiff, as follows:

"Upon the undisputed proofs in this cause, you are instructed to find a verdict in favor of the plaintiff, and against the defendant, for the amount paid by plaintiff to defendant under protest, for estate tax, upon the transfer of date April 21, 1915, made by Augusta Dickel to Detroit Trust Company, the amount of such estate tax being \$56,546.41; and in arriving at your verdict you will also add interest on said sum at five per cent (5%) per annum from December 15, 1917, the date of such payment, down to the present time."

The same being plaintiff's second request to charge.

43. That the court erred in refusing to charge the jury, as requested by plaintiff, as follows:

"The deed of trust of date April 21, 1915, took effect on its execution and delivery in or about April, 1915. It did not take effect at or after Mrs. Dickel's death, but more than a year prior thereto, and also more than a year prior to the enactment by Congress of the Estate Tax Law. Forthwith upon the delivery of the instrument, the legal title to the securities described in the trust deed passed from Mrs. Dickel to the Detroit Trust Company and vested in it. I therefore charge you that the defendant has no defense to this suit under that provision of the Act of Congress relating to the making of transfers or the creation of trusts to take effect in possession or enjoyment at or after the death of the decedent."

The same being plaintiff's third request to charge.

44. That the court erred in refusing to charge the jury, as requested by the plaintiff, as follows:

"The Act of Congress of September 8, 1916, provides, in substance, that the value of the gross estate of the decedent shall be determined by including the value at the time of her death, of all property, real or personal, to the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which she has created a trust in contemplation of death. I charge you that the words "in contemplation of death" do not refer to that general expectation of death which

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every mortal entertains, but rather the apprehension which arises from some existing condition of body or some impending peril."

The same being plaintiff's fourth request to charge.

45. That the court erred in refusing to charge the jury, as requested by plaintiff, as follows:

"If you find that when Mrs. Dickel made the deed of trust in question, she was an old woman, somewhat enfeebled, as a result of old age, and that she must have known that she could not live many years longer, yet if you further find that she was then under no apprehension of death arising from some existing condition of body or some impending peril, I charge you that the deed of trust was not made by her "in Contemplation of death," within the meaning of that phrase, as used in the Act of Congress."

The same being plaintiff's fifth request to charge.

46. That the court erred in refusing to charge the jury, as requested by plaintiff, as follows:

"It appears that Mrs. Dickel made the transfer to the Detroit Trust Company in or about the month of April, 1915, and that the Act of Congress, known as the Estate Tax Law, was not passed until September 8, 1916. I charge you, therefore, that there is no proof in this case tending to show that the transfer made by Mrs. Dickel to the Detroit Trust Company was made for the purpose of defrauding or evading the Federal Revenue Law."

The same being plaintiff's sixth request to charge.

47. That the court erred in refusing to charge the jury, as requested by plaintiff, as follows:

"In determining whether the transfer by Mrs. Dickel to the Detroit Trust Company was or was not made "in Contemplation of death" within the meaning of the statute, one of the elements proper to be considered is whether there was or was not an intent on the part of Mrs. Dickel to escape or avoid payment of the Estate Tax. Inasmuch as the Estate Tax Law was not passed by Congress until some sixteen months after the making of the transfer, I instruct you that this element of intent to escape or avoid the payment of the Estate Tax is wholly wanting in the suit at bar, and this is a circumstance which you are entitled to consider in arriving at your conclusion as to whether the transfer by Mrs. Dickel was or was not made in contemplation of death.

The same being plaintiff's seventh request to charge.

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48. That the court erred in refusing to charge the jury, as requested by plaintiff, as follows:

"There is proof in this case tending to show that one purpose of the transfer made by Mrs. Dickel to the Detroit Trust Company was that the Detroit Trust Company was a corporation organized under the Michigan laws, and doing business in this state, and that, by virtue of the transfer so made, it would be possible to take advantage of the Michigan statute, whereby securities of the character of those specified in the trust deed could be exempted from taxation upon paying to the County Treasurer of the proper county a tax of one-half of one per cent, under the Michigan laws. I charge you that Mrs. Dickel was lawfully entitled to make the transfer to the Detroit Trust Company, with the intent and for the purpose of thus availing herself of the benefits of this Michigan tax law, or to enable the beneficiaries under the deed of trust to procure for themselves that advantage."

The same being plaintiff's eighth request to charge.

49. That the court erred in refusing to charge the jury, as requested by plaintiff, as follows:

"The Act of Congress provides that any transfer of a material part of the decedent's property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to her death, without a fair consideration in money or money's worth, shall, unless shown to the contrary, be deemed to have been made in contemplation of death, within the meaning of the Act. I instruct you that this does not mean that if the transfer is made within two years prior to the death of the decedent, it will be conclusively presumed that the transfer was made in contemplation of death, but only that if all the conditions recited in the Act exist, the burden of proof is shifted and there is raised, by the terms of the law, a presumption that the transfer is made in contemplation of death. In other words, if the transfer is of "a material part" of decedent's property; if it is "in the nature of a final disposition or distribution thereof;" and if it is made "within two years prior to his death," without consideration, it is not even then declared to be made "in Contemplation of death." The Act merely declares that "unless shown to the contrary" it shall, in such case, be deemed to have been made "in Contemplation of death." But this is a presumption merely and may be rebutted by proofs

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in the cause; and I instruct you that if the plaintiff has shown, by a preponderance of evidence, that when Mrs. Dickel made the deed of trust in question she had only the general expectation of all rational mortals that she would die some time, but that she was then laboring under no apprehension of death arising from some existing infirmity or impending peril, the deed in question was not made "in contemplation of death" within the meaning of those words, as used in the Act of Congress."

The same being plaintiff's ninth request to charge.

50. That the court erred in refusing to charge the jury, as requested by plaintiff, as follows:

"There is testimony to the effect that in making Mrs. Dickel's income tax return for 1915, signed by Mr. Shwab in her behalf, there was included interest received during that year upon the securities in the hands of the Detroit Trust Company. Mr. Shwab has testified that this was done by mistake. I charge you that the fact that this item of interest was so included in the tax return for that year signed by Mr. Shwab for Mrs. Dickel does not tend to show that the deed of trust of date April 21, 1915, made by Mrs. Dickel to the Detroit Trust Company, and executed and delivered more than a year before her death, was intended to take effect or did take effect at or after her death, nor does it tend to show that it was made by her in contemplation of death."

The same being plaintiff's tenth request to charge.

51. That the court erred in refusing to charge the jury, as requested by plaintiff, as follows:

"I instruct you that the Act of Congress of September 8, 1916, is not retrospective in character, and that it does not impose a tax upon the deed of trust of date April 21, 1915, executed and delivered by Augusta Dickel to the Detroit Trust Company before the enactment of the law."

The same being plaintiff's eleventh request to charge.

52. That the court erred in refusing to charge the jury, as requested by plaintiff, as follows:

"I instruct you that if the Act of September 8th, 1916, could be construed to be retrospective and to impose a tax upon the transfer of April 21, 1915, it would be unconstitutional and void as a denial of due process of law, and the taking of private property for public use without compensation, contrary to the Fifth Amendment to the Constitution of the United States."

The same being plaintiff's twelfth request to charge.

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53. That the court erred in charging the jury as follows:

"The law authorized the taking into consideration, in certain instances and under certain conditions, of property which had been transferred absolutely, prior to the death of the person making the transfer, in arriving at the amount of the tax which was to be computed."

54. That the court erred in charging the jury as follows:

"Among other provisions of the law was one which, in substance, authorized the taking into consideration by the Tax Collector or the Commissioner of Internal Revenue, in levying the tax, property which had been transferred without consideration, that is, as a gift, at any time prior to the death of the person making the transfer, provided that such transfer, when it was made, was made in contemplation of death."

55. That the court erred in charging the jury as follows:

"That presents the sole question for your determination: Did Mrs. Dickel, in April, 1915, transfer to the Detroit Trust Company the trust property in contemplation of death, that is to say, at the time of making the transfer, did she have in contemplation her own death, and was that the reason for making the transfer to the Detroit Trust Company?"

56. That the court erred in charging the jury as follows:

"On the other hand, the meaning of the term ('in contemplation of death') is not necessarily limited to an expectancy of immediate death or a dying condition. We speak of gifts causa mortis, that is, gifts made because the person is in death or is dying. That condition is not what is meant."

57. That the court erred in charging the jury as follows:

"Nor is it necessary, in order to constitute a transfer in contemplation of death, that the conveyance or transfer be made while death is imminent; while it is immediately pending by reason of bodily condition, ill health, disease or injury or something of that kind."

58. That the court erred in charging the jury as follows:

"But a transfer may be said to be made in contemplation of death if the expectation or anticipation of death in either the immediate or reasonably distant future is the moving cause of the transfer."

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59. That the court erred in charging the jury as follows:

"And in this case, if you find that Mrs. Dickel, in April, 1915, was moved to create a trust and to make the transfer to the Detroit Trust Company by her expectation or anticipation of death in either the immediate or the reasonably distant future, then you will be warranted in finding that this transfer was made in contemplation of death."

60. That the court erred in charging the jury as follows:

"In determining that question, you have a right to take into consideration all the evidence in the case. You have the right also to take into consideration the provisions of the statute which Congress has enacted in that regard, and upon that subject the statute is this: Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death, without consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title. By that statute Congress created a rule of evidence merely. That statute raises a presumption that if a transfer is made within two years of the death of the person making the transfer, it is presumed to have been made in contemplation of death, unless the contrary is shown; and the burden in this case is upon the plaintiff to establish by a fair preponderance of the evidence, taking into consideration the presumption which the statute creates, that this transfer was not made by Mrs. Dickel in contemplation of her death."

61. That the court erred in charging the jury as follows:

"Take into consideration any other instruments, like wills that were executed about the same time."

62. That the court erred in charging the jury as follows:

"Take into consideration all of these matters and then say from the evidence in the case, bearing in mind the presumption which the statute raises and giving it the consideration to which it is entitled, and it is to be considered by you in connection with the other evidence in the case, whether or not that transfer by Mrs. Dickel to the Detroit Trust Company at that time was made by her in contemplation of her death."

Petition for Writ of Error.

63. That the court erred in charging the jury as follows:

"On the other hand, if you find, from the evidence and all the evidence in the case, that the moving cause of that transfer was her expectation and anticipation of death, it will be your duty to find that the transfer was made in contemplation of death."

64. That the court erred in denying the plaintiff's motion for a new trial.

By reason whereof plaintiff in error prays that the judgment aforesaid may be reversed, etc.

Butterfield, Keeney & Amberg,

Attorneys for Plaintiff.

PETITION FOR WRIT OF ERROR AND ORDER—

Filed October 17, 1919.

And now comes the said plaintiff, by Butterfield, Keeney & Amberg, his attorneys, and prays the allowance of a writ of error to remove the judgment and proceedings in this cause into the United States Circuit Court of Appeals for the Sixth Circuit, in order that said plaintiff may obtain a review in said United States Circuit Court of Appeals of said judgment; and the plaintiff also prays that a citation may issue to said defendant, pursuant to the laws of the United States and the rules and practice of this Honorable Court.

Dated October 13, 1919.

Willard F. Keeney,

Butterfield, Keeney & Amberg,

Attorneys for Plaintiff.

A writ of error in the above entitled cause is hereby allowed, as prayed for in the foregoing petition. The bond of date July 1, 1919, heretofore filed by plaintiff, is approved as a supersedeas bond.

Dated, Grand Rapids, Michigan, October 13, 1919.

C. W. Sessions,

United States District Judge.

WRIT OF ERROR—Filed Oct. 17, 1919.

United States of America, Sixth Judicial Circuit, ss.:
The President of the United States:

To the Honorable the Judge of the District Court of the
United States for the Western District of Michigan,
Southern Division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between Victor E. Shwab, Executor of the Last Will and Testament of Augusta Dickel, deceased, plaintiff, and Emanuel J. Doyle, United States Collector of Internal Revenue for the Fourth Collection District of Michigan, Defendant, a manifest error hath happened, to the great damage of the said Plaintiff, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in said Circuit, on the 15th day of November, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 17th day of October, in the year of our Lord one thousand nine hundred and nineteen and of the independence of the United States of America the one hundred and forty-fourth.

[Seal.]

Chas. J. Potter,

Clerk of the District Court of the United States, for the
Western District of Michigan.

Allowed by C. W. Sessions,

U. S. District Judge.

Copy of Writ of Error deposited for defendant in error
Oct. 17, 1919.

Plea.

United States of America, Sixth Judicial Circuit, ss.:

The President of the United States:

To the Honorable the Judge of the District Court of the United States for the Western District of Michigan, Southern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between Victor E. Shwab, Executor of the Last Will and Testament of Augusta Dickel, deceased, Plaintiff, and Emanuel J. Doyle, United States Collector of Internal Revenue for the Fourth Collection District of Michigan, Defendant, a manifest error hath happened, to the great damage of the said Plaintiff, as by his complaint appears. We being willing that error, if any hath been should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in said Circuit, on the 15th day of November, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals, may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 17th day of October, in the year of our Lord one thousand nine hundred and nineteen and of the independence of the United States of America the one hundred and forty-fourth.

[Seal.]

Chas. J. Potter,

Clerk of the District Court of the United States for the Western District of Michigan.

Allowed by C. W. Sessions,

U. S. District Judge.

CITATION—Filed October 18, 1919.

United States of America, Sixth Judicial Circuit, ss.:

To Emanuel J. Doyle, United States Collector of Internal Revenue for the Fourth Collection District of Michigan, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit to be holden at the City of Cincinnati, in said Circuit, on the 15th day of November, next, pursuant to a Writ of Error filed in the Clerk's Office of the District Court of the United States for the Western District of Michigan, Southern Division, wherein Victor E. Shwab, Executor of the Last Will and Testament of Augusta Dickel, deceased, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 17th day of October, in the year of our Lord one thousand nine hundred and nineteen and of the Independence of the United States of America the one hundred and forty-fourth.

C. W. Sessions,

U. S. District Judge.

Due personal service of a copy of the above citation admitted this 18th day of October, A. D. 1919.

Myron H. Walker,

Attorney for Defendant in Error.

PLAINTIFF'S PRECIPE FOR TRANSCRIPT—Filed Oct. 17, 1919.

To the Clerk of Said Court:

Sir—You will please incorporate into the transcript of the record herein the following portion of the files and records in this suit:

Order.

1. Declaration of plaintiff.
2. Defendant's plea.
3. Verdict for defendant.
4. Judgment for defendant.
5. The various stipulations and orders for extension of time to settle bills of exceptions, to October 10, 1919, inclusive.
6. Order denying motion for new trial.
7. Appeal bond.
8. Bill of exceptions.
9. Assignments of error.
10. Petition for writ of error, and order for allowance of same.
11. Plaintiff's preceipe for transcript.
12. All further proceedings relating to the writ of error, and the security given thereon, together with a copy of the citation and the evidence of service, etc.

Dated, October 13, 1919.

Yours, etc.,

Willard F. Keeney,
Butterfield, Keeney & Amberg,

Attorneys for Plaintiff.

Myron H. Walker, United States Attorney,
Attorney for Defendant.

ORDER EXTENDING TIME—Filed Nov. 6, 1919.

It appearing that the transcript on error will not be ready to go forward in this cause within the time now limited therefor, it is hereby ordered that the time for filing said transcript be and hereby is extended to and including the first day of December next.

Dated November 6th, 1919.

C. W. Sessions,
U. S. District Judge.

Clerk's Certificate.

United States of America, Western District of Michigan, Southern Division, ss.:

I, Chas. J. Potter, Clerk of the United States District Court for the Western District of Michigan, do hereby certify that the within and foregoing are true and compared copies of all those parts of the files and records in the within entitled cause which are specified in the joint preceipe of counsel for the respective parties, omitting such portions thereof as are required to be omitted by Rule 15 of the United States Circuit Court of Appeals for the Sixth Circuit, to which I have attached the original citation, the original writ of error and the original order extending time for filing the transcript in said cause; the whole constituting the transcript on error in said cause as made up pursuant to said joint preceipe.

Witness my hand and the seal of said District Court at the City of Grand Rapids in said district and division this 28th day of November in the year of our Lord one thousand nine hundred and nineteen.

(Seal) Chas. J. Potter, Clerk.

By Chas. L. Fitch, Deputy.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SIXTH CIRCUIT.

Appearance of Counsel.

(Filed Dec. 2nd, 1919).

Arthur B. Mussman,
Clerk of said court:

Please enter *my* appearance as counsel for the Plaintiff in
Error.

WILLIAM F. KEENEY.
BUTTERFIELD, KEENEY & AMBERG.
JOHN J. VERTREES.

Entry Granting Leave to File Amicus Curiae Brief.

(June 10th, 1920.)

Upon application of Mr. Edward F. Treadwell, leave to
file brief as Amicus Curiae is granted.

Cause Argued in Part.

(June 10, 1920—Before Knappen, Denison, and Donahue,
C. JJ.)

This cause is argued in part by Mr. William F. Keeney for
the plaintiff in error and is continued until tomorrow for
further argument.

Cause Further Argued and Submitted.

(June 11th, 1920.)

This cause is further argued by Mr. D. M. Kelleher and
by Mr. Myron H. Walker, United States Attorney for the
defendant in error and by Mr. John J. Vertrees for the
plaintiff in error and is submitted to the court.

Judgment.

(Filed Dec. 10, 1920.)

Error to the District Court of the United States for the Western District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Michigan, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Opinion.

(Filed Dec. 10, 1920.)

Filed Dec. 10, 1920. Arthur B. Mussman, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

No. 3364.

VICTOR E. SHWAB, Executor, Plaintiff in Error,

vs.

EMANUEL J. DOYLE, Collector of Internal Revenue, Defendant in Error.

Error to the District Court of the United States for the Western District of Michigan.

Submitted June 11, 1920.

Decided December 10, 1920.

Before Knappen, Denison and Donahue, Circuit Judges.

KNAPPEN, *Circuit Judge*:

Suit by plaintiff in error to recover an estate tax paid under protest.

On April 22, 1915, decedent made to the Detroit Trust Company a deed absolute in form, conveying personal property worth about \$1,000,000 in trust, for the payment of both interest and principal to certain beneficiaries, with no reservation in favor of the grantor. The conveyance took immediate effect, and was accompanied by delivery of the property conveyed. It was purely voluntary and without monetary consideration. Decedent died September 16, 1916, possessed of a remaining estate of about \$800,000, upon which a tax was assessed and paid upon return by the executor under Title II of the revenue act of September 8, 1916 (39 Stat. C. 463; U. S. Comp. Stat. 1916, Sec. 6336½), which took effect seven days before decedent's death, viz., September 9, 1916. That tax is not involved here, nor is its validity questioned. The tax here in question was assessed under Sec. 202 of the same act, as upon a transfer made in contemplation of death. Plaintiff contended below and contends here (1) that the act was not intended to reach absolute conveyances in contemplation of death made before the passage of the act; (2) that if so intended it is unconstitutional; (3) that there was no substantial evidence that the transfer was "in contemplation of death" within the meaning of the statute. The trial court denied plaintiff's motion for a directed verdict, held the statute valid and applicable to the trust deed, if made in contemplation of death, and submitted to the jury the question whether it was so made. There were verdict and judgment for defendant.

1. Was the act intended to apply to transfers made before its passage? Section 202 includes in the taxable value of a decedent's estate (a) property held by the decedent at the time of his death and subject thereafter to the payment of debts and expenses of administration, and to distribution as part of his estate; (b) property "of which decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a *bona fide* sale for a fair consideration in money or money's worth"; (c) property held jointly or as tenants in the entirety by decedent and any other person.

It will be observed that the transfers mentioned in subdivision (b) are of two classes,—those made "in contemplation of death" and those "intended to take effect in possession

or enjoyment at or after" death. We are concerned with the first only of these classifications.

In our opinion the statute evidences an intent on the part of Congress that the tax should apply to all transfers in contemplation of death, whether made before or after the passage of the act, provided the transferrer's death occur after the act took effect. This intent is, we think, evidenced by a variety of considerations.

(a) Section 201 imposes a tax upon the transfer of the net estate of "*every*" person dying after the passage of this act." In Sec. 202 the taxable estate of the decedent embraces all transfers of the two classes already mentioned which the decedent has "*at any time made.*" The remaining paragraph of Sec. 202*b* not already set out declares that "*any transfer* of a material part of his property in the nature of a final disposition or distribution thereof made by the decedent *within two years prior* to his death without such a consideration [a fair consideration in money or money's worth] shall unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title." The italicized words in each of the above quotations indicate, on their face, an all-embracing intent, and are thus *prima facie* opposed to a limitation to transfers made after the passage of the act.

(b) The evident theory of the statute is that transfers intended to take effect after the death of the grantor, as well as those made in contemplation of death, are equally testamentary in character. *Rosenthal v. People*, 211 Ill. 306, 309; *Keeney v. New York*, 222 U. S. 525, 536. Such classification is within the power of Congress. The theory of taxation on account of transfers testamentary in character is that death is the generating source of the tax. *Knowlton v. Moore*, 178 U. S. 41, 56; *Cahen v. Brewster*, 203 U. S. 543, 550. A transfer is accordingly taxed only at the death of the transferrer, no matter how long the transfer may precede death. Congress has accordingly included the two classes of transfers in one and the same section and subjected them, so far as terms go, to precisely the same treatment. In our opinion a transfer intended to take

¹ All Italics in this opinion ours.

effect in possession or enjoyment after the grantor's death would under this statute be taxable, although made before the passage of the act. *Wright v. Blakeslee*, 101 U. S. 174, 176. The natural inference would be, in the absence of substantial evidence to the contrary, that the same result was intended as to transfers made in contemplation of death.

(c) While the interests derived by a grantee under an absolute and immediately effective conveyance in contemplation of death are vested, the same is true of any irrevocable conveyance which takes effect in possession or enjoyment only upon the death of the grantor, although in the latter case such vesting is merely in expectancy. If Congress had power, as we think it had, to tax both classes of conveyances, even if made before the passage of the act, no good reason suggests itself why it should desire to discriminate between the two classes of transfers.

It is not to our minds unnatural, nor is it necessarily unjust, that Congress should intend that one taking a conveyance of a testamentary character, entirely without consideration, should do so at the risk of having the transfer taxed, directly or indirectly, as would be the case were the transfer by will or by conveyance taking effect at or after the grantor's death. Under this statute, however, the remaining estate of the decedent, both in case of a transfer intended to take effect at the grantor's death and in the case of a transfer made in contemplation of death (as well as in the case of transfers by will), is made primarily liable for the tax, and it is only when the estate proves insufficient for the purpose that resort may be had, under Sec. 209, to the personal responsibility of the transferee or to the property transferred, and even then a right of action over is given to the transferee. We find in the language of Sec. 209 ("if a decedent makes a transfer of or creates a trust with respect to, etc.") nothing which we think inconsistent with the construction of the act which we find disclosed by Sec. 202 and by the other considerations to which we have called attention. Section 209 pertains merely to the remedy for the collection of the tax.

(d) Congress has not been averse to imposing taxation for a period preceding the passage of the taxing act. This has been ordinary practice with respect to income taxes. Indeed, the revenue act of September 8, 1916, here in question, pro-

vided for taxation of income accruing during the entire year beginning January 1, 1916. While in that case less than a year had elapsed, the distinction from the case presented here is one of degree and not of principle. The present income tax act, however, passed February 24, 1919 (40 Stat. C. 18), imposed taxation for the year 1918, then wholly passed.

It is true that if the tax before us is retroactive it might, at least theoretically, affect conveyances made many years before a grantor's death, but this consideration is hardly practical. Congress would, we think, scarcely be impressed with a practical likelihood that a transfer made many years before a grantor's death (say 25 years, to use plaintiff's suggestion) would be judicially found to be made in contemplation of death under the legal definition applicable thereto, and without the aid of the two years *prima facie* provision. The considerations which we have enumerated not only outweigh in our opinion those opposed thereto, but we think clearly, positively and imperatively demand that the act be construed as intended to apply to transfers of the class here in question, although made before the act was passed, provided the death of the transferor occurs thereafter.

2. Is the statute unconstitutional as applied to the trust deed? In our opinion the act, if so construed, is not void as denying due process of law or as violating the fifth amendment to the constitution. *Billings v. United States*, 232 U. S. 261, 282-3; *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1, 23, 24. Nor do we think the tax is to be classified as a direct tax, and thus void as within the constitutional requirement of apportionment. It is clearly an excise or duty tax. *Scholey v. Rew*, 23 Wall. 331; *Knowlton v. Moore*, *supra*, at p. 78; *Flint v. Stone-Tracy Co.*, 220 U. S. 107, 159; *Keeney v. New York*, *supra*, at p. 537. Without enumerating every objection suggested against the validity of the tax, we think it enough to say that in our opinion its validity must depend upon whether or not it can be said to interfere with vested rights. As regards this consideration, we may set to one side the interests of the beneficiaries under the trust deed. Not only are they not complaining, but no tax has been assessed against their interests. No interest, vested or unvested, on their part is proposed to be or can be taken under the statute and the existing facts, for not only

is decedent's remaining estate able to pay the tax, but it has already paid it. Decedent's estate alone, and those interested therein under her will, must bear the burden. It is settled law that one attacking a statute as unconstitutional must show that the alleged unconstitutional feature injures him. *Southern Ry. v. King*, 217 U. S. 524, 534; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544-5.

As to plaintiff's interest: Assuming that he is entitled to raise the question, we think the statute not invalid because applying to transfers made before its passage. It does not affect transfers made after the transferor's death. Being within the all-embracing power of Congress over the subject of excise and transfer taxation, it is not necessarily unconstitutional merely because retroactive. *Cooley on Taxation* (3rd ed.), pp. 492-494; *Billings v. United States*, 232 U. S. 261, 282, where the validity of the 1909 tonnage act on the use of foreign-built yachts was assailed as retroactive; *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1, 20, which involved the validity of the income tax of 1913 as against a similar objection; *Stockdale v. Insurance Co.*, 20 Wall. 323, 331 *et seq.*, which involved the income tax law of 1867. True, none of the cases referred to is on all fours with the instant case, but we think the principles they announce are decisive. Decedent's death being the generating source of the taxation, and the statute validly classifying it as of testamentary character, it logically follows, in our opinion, that it is valid to impose at decedent's death a tax on the testamentary transfer occurring before the passage of the act, regardless of the fact that title had already passed to the transferees. In *Cohen v. Brewster*, *supra*, pp. 549 *et seq.*, a statute imposing an inheritance tax was sustained as to legatees of decedents dying prior to its enactment, but whose estates were still undistributed. This case is not without a certain amount of analogy; nor is there any controlling difference in principle between the assessment of a tax upon a previous testamentary transfer and the imposition of an income tax after the period covered thereby has wholly or in large part passed; nor,—considering that death is the generating source of estate taxation,—between an estate tax upon a transfer created by will and one upon a transfer created by testamentary deed, merely because in the one case a right of revocation existed while in the other it is ab-

sent, or because one took effect before and the other after the death of the transferor.

This conclusion makes it unnecessary to consider the correctness of the construction put upon the act by the trial judge, which distinguished between the "net estate" burdened by the tax, viz.: that which remained at decedent's death, and the net estate resulting from a gross estate which includes, for purposes of measurement, property previously transferred.

Plaintiff urges that in including in the revenue act of 1918 (40 Stat. 1057, 1097), the words "whether such transfer is made or occurred before or after the passage of this act," Congress indicated an understanding that the act here in question was not intended to so provide. We think it, however the more reasonable inference that the amendment of 1918 was made to elucidate without changing the law, and put at rest any controversy on the subject. *Johnson v. So. Pacific R. R. Co.*, 196 U. S. 1, 20, 21; *United States v. Coulby* (D. C.), 251 Fed. 982, 985-6; affirmed—C. C. A. 6—258 Fed. 27.

3. Meaning of the phrase "in contemplation of death." Plaintiff asked an instruction that "the words 'in contemplation of death' do not refer to that general expectation of death which every mortal entertains, but rather the apprehension which arises from some existing condition of body or some impending peril." This request was refused, and the jury instructed that "by the term 'in contemplation of death' is not meant on the one hand the general expectancy of death which is entertained by all persons, for every person knows that he must die * * *. On the other hand, the meaning of the term is not necessarily limited to an expectancy of immediate death or a dying condition. * * * The term 'in contemplation of death' involves something between these two extremes. Nor is it necessary, in order to constitute a transfer in contemplation of death, that the conveyance or transfer be made while death is imminent, while it is immediately impending by reason of bodily condition, ill-health, disease or injury, or something of that kind. But a transfer may be said to be made in contemplation of death if the expectation or anticipation of death in either the immediate or reasonably distant future is the moving cause of the transfer."

It may be conceded that plaintiff's requested instruction would have been proper as applied to a gift claimed to have been made *causa mortis*,—when the grantor was in a dying condition. But the instant case presented no such issue or claim. The transfer in question was an absolute gift *inter vivos*, claimed by the government to have been been testamentary in character. On principle, and without present reference to authority, the ultimate question concerns the motive which actuated the grantor, that is to say, whether or not a specific anticipation or expectation of her own death, immediate or near at hand (as distinguished from the general and universal expectation of death some time), was the immediately moving cause of the transfer. Both the element of "existing condition of body," as distinguished from the grantor's mental state on that subject, and the term "impending,"² are inconsistent with the *prima facie* provision of Sec. 202*b*, which we have set out in paragraph (a) of the first division of this opinion.

Plaintiff's contention also overlooks the contribution which may be made to the grantor's state of mind and motive by a realization of the fact that she had already lived many years beyond the scriptural limit. Of course, the grantor's bodily health, especially as known to her, was an important factor in ascertaining her state of mind and determining the ultimate question whether she was directly actuated by a "contemplation of death." Upon principle we think the court's instruction correct.

Nor do we think the trial court's definition in conflict with any settled and controlling rule of construction. No federal decision directly in point is cited. Plaintiff relies on the decisions of the courts of New York, Illinois, Wisconsin and California, construing similar statutes antedating the federal act (that of New York—1892—being the first in point of time), not only as authority for the construction for which he contends, but as raising a presumption that Congress adopted the construction put by the highest courts of those states upon their statutes.

In our opinion the decisions relied on by plaintiff do not completely or uniformly support his definition. The New York decisions are not convincing. In the matter of *Sea-*

² The Century Dictionary defines "impend" as "To overhang; be ready to fall; be imminent; threaten; be on the point of occurring, as something evil."

man, 147 N. Y. 69 (1895), the expression "in contemplation of death" was said in effect to be confined to conveyances *causa mortis*. While this statement was obiter, it seems to have been reflected in some at least of the subsequent decisions of the New York courts; and while the proposition above cited was definitely rejected in *In re Dee's Estate* (148 N. Y. Supp. 423; affirmed, 1914, 210 N. Y. 625), and conveyances *inter vivos* held to be embraced within the phrase "in contemplation of death," it would not be unnatural that the decisions meanwhile construing that phrase should be more or less influenced by such earlier classifications. For instance, in the matter of *Spaulding's Estate* (63 N. Y. Supp. 694; affirmed, 163 N. Y. 607), the decision was substantially rested on the ground of lack of evidence that the conveyance was made when the grantor was *in extremis*, or that it was made to avoid the estate tax. In the matter of *Mahlstedt's Estate* (73 N. Y. Supp. 818, 820)—decided before the statute had been definitely held to apply to gifts *inter vivos*—the essential question was said to be whether the transfer "was made in the then belief that he was not going to get well; that it was made in contemplation of his impending death, and for the purpose of defrauding the state of the transfer tax." Manifestly, the question of intent to evade has no pertinency to the case of a purely testamentary conveyance *inter vivos*. *Rosenthal v. People*, 211 Ill. App. 308, 309. As showing the lack of the settled construction in New York contended for by plaintiffs, it is significant that in the *Crary* case (64 N. Y. Supp. 566, 568) the statute was defined as said to be "intended to reach absolute transfers of property when made under a certain condition, viz.: when the transferrer was contemplating death; that is, the thought of death has taken so firm a hold on his mind as to control and dictate his actions regarding his property, and the business is transacted while contemplating death, and considering what conditions would arise or exist in the event of death without making the transfer, or, to be more specific, the contemplation of death is the sole motive and cause of the transfer." The state of mind of the grantor was, at least impliedly, recognized as the ultimate test (p. 569).

The Illinois decisions fall short of supporting plaintiff's definition. In *Rosenthal v. People*, 211 Ill. 306, 309, the only definition of "in contemplation of death" is this: "A gift

is made in contemplation of an event when it is made in expectation of that event and having it in view, and a gift made when the donor is looking forward to his death as impending, and in view of that event, is within the language of the statute." The second half of the quotation presumably relates to the application to the statute of the facts of the case. *Merrifield v. People*, 212 Ill. 400, contains no definition of the term we are considering. The same is true of *People v. Kelly*, 218 Ill. 509, 515. There a question of fact was alone involved, the court finding no evidence tending to show that the transferrer "thought he was about to die at the time he executed said trust deed, or that he made said trust deed in contemplation of his death." In *In re Estate of Benton*, 234 Ill. 366, 370, the definition given in *Rosenthal v. People* was cited with approval. The court, after citing both the *Rosenthal* and *Kelly* cases, said: "Under the law as established by the foregoing decisions, the question at issue is whether the gift was made in expectation of death, and a purpose on the part of the donor to place his estate, or some part thereof, in the hands of those whom he desired to enjoy it after his death." It is true that in *People v. Carpenter*, 264 Ill. 400, 408, the court, citing the *Rosenthal* and *Benton* cases, remarked: "Of course, the words 'in contemplation of death' as used in these statutes do not mean that general expectation of all rational mortals that they will die sometime, but it means an apprehension of death which arises from some existing infirmity or impending peril." But not only do the *Rosenthal* and *Benton* cases fall short of fully sustaining that definition as an exclusive one, but the language we have quoted was purely obiter, as no claim was made that the trust agreements were executed "in view of death," and the decision in the trial court, as expressly stated in the opinion of the Supreme Court, did not rest on that ground (p. 408).

Nor do the Wisconsin cases support plaintiff's contention. In *State v. Pabst*, 139 Wis. 561, 590, it is said that the words "in contemplation of death" are "evidently intended to refer to an expectation of death which arises from such a *bodily or mental* condition as prompts persons to dispose of their property and bestow it upon those whom they regard as entitled to their bounty"; and again, "A transfer valid as a gift *inter vivos*, if made under circumstances which impress it with the distinguishing characteristics of being prompted by an ap-

prehension of impending death, occasioned by a *bodily or mental* state which has a basis for the apprehension that death is imminent, would be a transfer made in contemplation of death within the meaning of law." True, in *State v. Thompson*, 154 Wis. 320, 328-9, the court cited with approval the holdings in the *Pabst* case, which we have already quoted; the quotation which we give in the margin from *In re Baker's Estate*³ (82 N. Y. Supp. 390-2, affirmed 178 N. Y. 575, also decided before the New York statute had been authoritatively held to include gifts *inter vivos*), and the holding in *People v. Burkhalter*, 247 Ill. 600, 604, that "contemplation of death must be the impelling motive for making the gift in order that it be subject to an inheritance tax." The definitions given in these various citations are not uniform or entirely consistent. Moreover, the decision of the *Thompson* case seems to have turned at the last on the question whether the grantor's age "was so great when the gifts in question were made as to establish the fact that they were made in contemplation of death."

The California decisions are not specially pertinent, for the reason that the California statute contains a definition of the term "in contemplation of death." *Estate of Reynolds*, 169 Cal. 600; *Kelly v. Woolsey*, 177 Cal. 325; *Abstract Co. v. State*, 178 Cal. 691, 694; *Spreckles v. California*, 30 Cal. App. 363, 369; *McDougald v. Wulzen*, 34 Cal. App. 21; *In re Minor's Estate*, 180 Pac. 813. It is enough to say of these decisions (a) that they are not authority for the definition contended for by plaintiff; (b) that they specifically reject the New York definition, based upon the confusion between gifts *causa mortis* and conveyances *inter vivos*. *Estate of Reynolds, supra*, at p. 603.

Criticism is made upon the expression "reasonably distant future," contained in the extract from the charge which we print in the margin.⁴ It is, we think, not open to question that had the word "close" instead of "distant" been

³ "This court has held that the words 'in contemplation of death' do not refer to that general expectation which every mortal entertains, but rather the apprehension which arises from some existing condition of body or some impending peril."

⁴ "But a transfer may be said to be made in contemplation of death if the expectation or anticipation of death in either the immediate or reasonably distant future is the moving cause of the transfer."

used the instruction would have been proper, so far as concerns imminency. That the trial court regarded the words as equivalent, or intended to use the words "reasonably close," appears from his opinion announced immediately before instructing the jury, in which the words "reasonably close" were used. While "close" and "distant" are frequently directly opposed to each other, yet when used as here they are not necessarily opposed. A time which is only reasonably distant is reasonably close. There was nothing in the exception to the definition as made which would call the trial court's attention to a proposition that the word "close" should have been used instead of "distant," especially since there had been also an exception given to the court's announced intention to charge a "reasonably close" future. *Norfolk & Western Ry. Co. v. Earnest*, 229 U. S. 114, 119-20. Had the court's attention been called to the use of the word "distant" instead of "close," doubtless any question of difference between the two would readily have been obviated.

4. The sufficiency of the evidence. The motion to direct verdict was properly overruled if there was substantial testimony tending to support a conclusion that the conveyance was made in contemplation of death, even though the testimony would have supported a contrary conclusion, as it doubtless would. We can not weigh the testimony. In our opinion there was substantial testimony, and as it must be considered in its aspect most favorable to defendant, we so state it, omitting for the most part specific mention of the considerations relied on by plaintiff where not as matter of law decisive.

Decedent was about 77 years of age when the trust deed was made. She had rheumatism of the knee and was subject to frequent attacks of constipation, a condition said to have a tendency in elderly people to auto-intoxication. She had arterio-sclerosis, which according to the medical testimony is usually fatal, and she died of apoplexy, a medical attendant testifying that in his judgment the apoplexy and death primarily resulted from hardening of the arteries, secondarily from age. She was a childless widow and had lived most of the time for many years in the family of a sister who was a paralytic, and who was the wife of Mr. Shwab, who was one of the beneficiaries in the deed of trust, the executor of decedent's will and her business partner. Mr. Shwab had sole charge and management of the business,

which was carried on at Nashville, Tennessee, where Mr. Shwab and his family resided. During his life he was to receive the entire income from the trust estate. He was given the right to require sales of the trust securities to be made from time to time and select substitutes therefor, and to have accountings made to him by the trustee. After his death the income was to be divided among six of the children of Mr. and Mrs. Shwab, subject to letting in a seventh child on the failure of issue of any of the other six. There were other provisions not important here.

The trust deed contains an express recital of decedent's desire "to make a division of the part of her estate particularly described herein"—words naturally importing a testamentary conveyance. On May 26, 1915, slightly more than a month after the trust deed was executed, decedent, her sister and Mr. Shwab made their respective wills. Decedent's will, after making comparatively small bequests to the sister and her children, and providing for a continuance of the business after her death, at the option of Mr. Shwab, gives the latter absolutely the bulk of her estate, the will stating that "he and his wife, my sister Emma, and I have considered the disposition of our estates and agreed as to what under all the circumstances will be best for those for whom it is our desire to provide. * * * My sister will understand why I have bequeathed nothing to her. She has an abundance and well knows my affection for her, and that I have in contemplation that form of disposition of my estate which eventually will benefit those she loves so dearly"—referring to her sister's children. Considering the recitals we have quoted from the trust deed and decedent's will and taking into account all the attendant circumstances, it was open to inference by the jury that the deed was intended by decedent as part and parcel of one and the same general testamentary disposition. In 1914 decedent purchased a summer home in Michigan and became at that time a resident of that State. She continued to live in her sister's family except during the summer. While there was testimony tending to show that decedent's motive in making the trust deed was merely to avoid Tennessee taxation, the jury was not bound under the evidence to so conclude, especially in view of the fact that she had never been called upon to pay taxes upon her securities in Tennessee, and that she was in fact a resident of Michigan when the trust

deed was made. The record contains, and counsel have discussed, a variety of considerations affecting the question of motive and the broader question whether the trust deed was made in contemplation of death. We think it clear that the evidence presented a question of fact for the jury's determination.

5. The instruction that the "presumption" afforded by the *prima facie* clause of section 202*b*, which is referred to in subdivision (a) of the first division of this opinion, could be taken into account in determining the fact of "contemplation death" was not erroneous. *R. R. Co. v. Landrigan*, 191 U. S. 461, 473-4. The provision in question raises a presumption of fact, not a presumption of law, and under well-settled rules a presumption of fact may be taken into account in determining the ultimate fact. The presumption is merely a rule of evidence whose enactment is within the legislative competency. *Mobile, etc., R. R. Co. v. Turnipseed*, 219 U. S. 35, 42. The very object of a presumption of fact is to supply the place of facts. *Lincoln v. French*, 105 U. S. 614, 617. Of course, a presumption can never be allowed against ascertained and established facts. But unless the statutory presumption may properly be taken into account in determining the ultimate fact, it has no office. Elements which, in the absence of evidence to the contrary, are made sufficient to conclusively establish the ultimate fact, can not be said to have no evidentiary influence in reaching that conclusion.

6. Admission and exclusion of evidence. We find no reversible error in either of the respects complained of. The witness Spicer was not shown competent to answer the question put to him. It was plainly incompetent for Mr. Shwab to state a fact which was for the ultimate conclusion of the jury, viz.: whether Mrs. Dickel had any expectation that she was in danger of passing away in the near future. It was also plainly incompetent for the witness Hager to testify that he understood that Mrs. Shwab, Mr. Shwab and Mrs. Dickel made their wills together "so that they would not excite Mrs. Shwab." He apparently had no first-hand knowledge of the matter. As to the inquiry of Mr. Shwab, on cross-examination, respecting the inclusion in Mrs. Dickel's income tax return of the first year's income under the trust deed: The court had already held that the income tax returns were not admissible. The question asked Mr.

Shwab regarding the making of such return was objected to only as "immaterial." No exception was taken to the overruling of the objection. The subject was, in our opinion, material. He then testified, without objection, that the first year's income from the trust estate was included in that income tax return as part of Mrs. Dickel's income. It was only after the question had been substantially repeated that it was objected to, as "incompetent, immaterial and irrelevant," but without statement of the ground of the asserted incompetency, and without motion to strike out the testimony already given. The objection was overruled, and the answer was substantially the same as before. The witness then testified at some length in explanation of an asserted mistake in making such inclusion. It is unnecessary, in our opinion, to determine whether the testimony in question was, for any reason, incompetent, for we think the objection on that score came too late. We do not intimate an opinion that it was incompetent. It was material to show that neither Mr. Schwab nor Mrs. Dickel had paid any taxes in Tennessee, or were liable to be required to so pay, in view of the fact that such liability had been put forward by plaintiff's counsel as the reason for making the trust deed in question.

Finding no error in the record, the judgment of the district court must be affirmed.

Petition for Writ of Error, etc.

(Filed Dec. 29th, 1920.)

Application of Plaintiff in Error for Writ of Error from the Supreme Court of the United States to the United States Circuit Court of Appeals, Sixth Circuit, to Review Its Judgment in the Cause Above Entitled.

To Honorable Loyal E. Knappen, Circuit Judge of the United States Circuit Court of Appeals, Sixth Circuit:

The petition of Victor E. Schwab, executor of the last will and testament of Augusta Dickel, deceased, respectfully shows:

1. Your petitioner is the sole plaintiff in error in the cause above entitled, and was the sole plaintiff therein when said

cause was pending in the District Court of the United States for the Western District of Michigan, Southern Division. Your petitioner is executor of the last will and testament of Augusta Dickel, deceased, having been duly appointed as such executor by the Probate Court for the County of Charlevoix in the State of Michigan, upon the 18th day of October, 1916, and having duly qualified as such executor. Said Augusta Dickel was at and prior to the time of her death a resident of said County of Charlevoix and died upon the 16th day of September, 1916.

II. At the time of her death said Augusta Dickel was possessed of a gross estate valued at \$855,596.39, upon which estate an estate tax was payable by your petitioner under Title 11 of the Act of Congress of the United States entitled "An Act to Increase the Revenue and for other Purposes", approved September 8, 1916 (39 Stat. 463). Said gross estate was subject to deductions amounting to \$50,754.15 as allowed by said Act of Congress, and there was thus left, subject to taxation, a net estate of \$804,842.24 upon which the tax payable was \$31,242.12. This tax your petitioner paid without protest and the same is not questioned in this suit.

III. Upon the 21st day of April, 1915, said Augusta Dickel in her lifetime entered into and executed with the Detroit Trust Company, a corporation organized and existing under the laws of the State of Michigan, with its principal office for the transaction of business in the city of Detroit in said State, an absolute deed of trust conveying personal property worth \$975,000 to said Trust Company for the payment of both interest and principal to certain beneficiaries with no reservation of any sort in favor of said Augusta Dickel. Said conveyance took immediate, irrevocable effect and was accompanied by delivery of the property conveyed. The income from said trust was made payable to your petitioner for life, and after his death, the income was made payable equally to six of your petitioner's children or to their issue during the continuation of the trust. Upon the conclusion of the trust, at the death of the last survivor of said children, the principal of said trust was made payable to the issue of said children, or in certain contingencies, to a seventh child of your petitioner, or his issue.

IV. On or about December 1, 1917, the United States Commissioner of Internal Revenue assessed your petitioner, as executor of the last will and testament of Augusta Dickel, deceased, an alleged additional estate tax upon said estate, alleging the same to be assessed under the Act of Congress aforesaid, as follows, viz: the sum of \$56,548.41, being an alleged tax upon the value of said property transferred in said trust agreement of said Augusta Dickel during her life time, which transfer was alleged to have been made by said Augusta Dickel in contemplation of death, and to be a part of her estate within the meaning of Section 202, paragraph (b) of the Act of Congress, aforesaid. On the 7th day of December, 1917, the United States Collector of Internal Revenue for the Fourth Collection District of Michigan, the defendant herein, demanded of your petitioner, as executor aforesaid, the payment of the alleged additional tax aforesaid. Thereupon, in order to prevent the accruing of penalties and distraint of your petitioner's property, your petitioner on to-wit, December 15, 1917, paid to said defendant the sum of \$56,548.41, being the amount of the alleged additional estate tax assessed as aforesaid under protest, which protest was made orally, and also in a letter of date December 14, 1917. On December 21, 1917, your petitioner as executor as aforesaid, caused an appeal for the refund of said sum of \$56,548.41 to be made to the United States Commissioner of Internal Revenue in manner and form as provided in Section 3226 of the Revised Statutes of the United States, the provisions of law in that regard and the regulations of the Secretary of the Treasury in pursuance thereof. On May 27, 1918, the United States Commissioner of Internal Revenue refused, rejected and denied said appeal and the said sum has not been to your petitioner refunded.

V. Thereafter and on, to-wit, July 3, 1918, your petitioner instituted suit in the District Court of the United States for the Western District of Michigan, Southern Division, against the defendant herein for the recovery of said alleged tax, so paid under protest, together with interest thereon. Thereafter and on, to-wit, October 9, 1918, the defendant herein filed a plea of the general issue to the declaration of your petitioner filed in said suit. Upon the 10th day of June 1919 before the Honorable Clarence W. Sessions,

District Judge of said Court, said cause came on to be tried upon pleadings and proofs before a jury, which trial continued until the 13th day of June, 1919. On the 13th day of June, 1919, a verdict for said defendant was rendered, and upon July 1, 1919, a judgment for said defendant was rendered and entered. Thereafter, motion for new trial having been denied, said cause, by writ of error of date October 17, 1919, was removed to the United States Circuit Court of Appeals, Sixth Circuit, and docketed as case #3364. Thereafter and on, to-wit, June 11, 1920, said cause was argued and submitted in said United States Circuit Court of Appeals, Sixth Circuit, which Court rendered a decision therein upon December 10, 1920, which decision affirmed the judgment of said District Court hereinbefore mentioned, and ruled that the assignments of error filed by your petitioner with regard to the record, proceedings and judgment in said District Court were without foundation in law. On the 10th day of December, 1920, judgment was rendered in said United States Circuit Court of Appeals, Sixth Circuit, upon said decision, affirming the judgment of said District Court. It is this judgment and the record and proceedings of this cause in said United States Circuit Court of Appeals, Sixth Circuit, which your petitioner desires to have reviewed, re-examined and reversed upon writ of error from this Court.

VI. In said letter of protest, said appeal to the Commissioner of Internal Revenue and in the declaration of your petitioner filed in said suit in said District Court, your petitioner protested against the payment of said alleged tax of \$56,548.41, demanded its refund and sought recovery of the payment thereof made under protest for the following reasons:

First. The additional estate tax imposed upon the estate of Augusta Dickel, deceased, is not imposed upon the transfer of the net estate of said Augusta Dickel, who died on September 16, 1916, but the same is sought to be imposed upon a transfer of property made by Augusta Dickel to the Detroit Trust Company, Trustee, by instrument bearing date April 21, 1915, executed and acknowledged by said Augusta Dickel on April 22, 1915.

Second. The additional estate tax imposed upon the estate of Augusta Dickel is sought to be imposed upon said transfer of property made by Augusta Dickel to the Detroit Trust Company, Trustee, bearing date April 21, 1915, and said transfer was not made by said Augusta Dickel in contemplation of death.

Third. Said additional estate tax is sought to be imposed under the supposed authority of title II of an Act of the Congress of the United States, entitled "An Act to Increase the Revenue, and for other Purposes," approved September 8, 1916, and said Act is not retrospective in character and does not authorize the imposition of an estate tax upon said transfer of property made in or about April of the year 1915, long prior to the passage of said Act of Congress.

Fourth. The transfer of property made by said Augusta Dickel to the Detroit Trust Company, Trustee, by instrument bearing date April 21, 1915, was made at the *a* time when the above mentioned Act of Congress had not been proposed and was not contemplated and the transfer then made was not such a transfer as is embraced within the true intent and meaning of said Act of Congress, and was not in contemplation of death within the meaning of title II of said Act.

Fifth. Even if the Act of September 8, 1916, be retroactive in character, and the transfer made to the Detroit Trust Company April 21, 1915, be within its terms, in so far as it affects that transfer it is ineffectual and void for that it is a denial of due process of law, and the taking of private property without compensation.

VII. In said United States Circuit Court of Appeals Sixth Circuit, your petitioner contended that the judgment of said District Court should be reversed for the same reasons set forth in said letter of protest, said appeal for refund and said declaration, and relied upon assignments of error based thereon and upon exceptions to the rulings of said District Court in the proceedings in said cause. Said judgment of said United States Circuit of Appeals, Sixth Circuit, denied your petitioner's contentions.

VIII. This case, from the time of the institution thereof, through the trial thereof in said District Court and in said

Circuit Court of Appeals, has continuously involved the construction or application of the Constitution of the United States, and in this case your petitioner has drawn in question the constitutionality of a law of the United States in that your petitioner has contended and still contends that the Act of Congress aforesaid is ineffectual, void and unconstitutional as not within the taxing power of Congress, and as constituting a denial of due process of law and the taking of private property without compensation, contrary to the Fifth Amendment to the Constitution of the United States, if said law is construed to impose a tax with respect to said deed of trust absolutely and irrevocably made upon April 21, 1915, long prior to the enactment of said law. Said judgment of said Circuit Court of Appeals has affirmed what your petitioner believes to be an unconstitutional exaction and a deprivation of your petitioner's property without due process of law and a taking of petitioner's property without compensation, which errors your petitioner believes should be reviewed in this Court, and which judgment should be reversed.

IX. Said judgment of said United States Circuit Court of Appeals, Sixth Circuit, has, as your petitioner believes, affirmed many other errors in the trial proceedings and judgment in this case and should be reversed. Your petitioner files herewith his prayer for reversal of said judgment and his assignments of error which assignments he asks be considered and passed upon in this Court.

X. Said judgment of December 10, 1920, rendered in said United States Circuit Court of Appeals, Sixth Circuit, is final, except that it is not made final in such sense that the same may not be reviewed in this Court by writ of error. As held by this Court in the case of Spreckles Sugar Refining Company vs. McClain, 192 U. S. 397, said judgment is reviewable in this Court by writ of error. The matter in controversy herein exceeds \$1,000.00 besides costs.

XI. The matters herein averred are contained in the record of the proceedings of said Circuit Court of Appeals, and will be transmitted to this Court upon the return of the writ of error herein prayed. Your petitioner avers that he is aggrieved by the said judgment of said Circuit Court of Appeals and he believes and submits that the same is erroneous and not in accordance with the law and justice of the case,

and that the same is contrary to the Constitution of the United States as aforesaid, and that said judgment ought to be reversed.

XIII. Your petitioner prays that the Honorable Supreme Court of the United States will re-examine said judgment of the United States Circuit Court of Appeals, Sixth Circuit, and reverse the same. Your petitioner prays that a writ of error issue out of the Supreme Court of the United States to the United States Circuit Court of Appeals, Sixth Circuit, to bring the said judgment and record in said case into the Supreme Court of the United States for re-examination, and prays for the allowance of a writ of error herein and for such other process as is provided by law to the end that the errors aforesaid done your petitioner in and by the judgment of said Circuit Court of Appeals in said cause may be corrected by the Supreme Court of the United States.

Dated December 28, 1920.

VICTOR E. SHWAB,

*Executor of the Last Will and Testament of
Augusta Dickel, Deceased,*

By WILLARD F. KEENEY,
His Attorney.

WILLARD F. KEENEY,

JOHN J. VERTREES,

Attorneys for Petitioner.

UNITED STATES OF AMERICA,

Western District of Michigan.

Southern Division, ss:

Willard F. Keeney being duly sworn deposes and says that he is, and since the institution of this suit in the District Court of the United States for the Western District of Michigan, has been one of the attorneys of Victor E. Shwab, executor of the last will and testament of Augusta Dickel, deceased, petitioner in the forgoing petition; that he was one of the attorneys of record and conducted the prosecution of the suit mentioned in said petition in the District Court of the United States for the Western District of Michigan, and upon writ of error in the United States Circuit Court of Appeals, Sixth Circuit; that therein he had occasion to investigate and ascertain the facts respecting the subjects of

litigation in said suit; that he has read the foregoing petition and knows the contents thereof and that the statements therein are true, except as to matters therein stated upon information and belief, and as to such matters, he believes it to be true; and that he is authorized to sign said petition for said petitioner.

WILLARD F. KEENEY.

Subscribed and sworn to before me this 28th day of December, 1920.

HARRIET L. MARTIN,
Notary Public, Kent County, Michigan.

My commission expires Dec. 6, 1922.

A writ of error in the above entitled cause is hereby allowed as prayed for in the foregoing petition. The bond of date December 28, 1920, in the amount of \$1,000.00 (One Thousand Dollars) to be filed herein is hereby approved as a supersedeas bond.

Dated December 28, 1920.

LOYAL E. KNAPPEN,
*Circuit Judge of the United State Circuit
Court of Appeals, Sixth Circuit.*

Assignments of Error.

(Filed Dec. 29, 1920.)

Now comes the said plaintiff in error by Willard F. Keeney and John J. Vertrees, his attorneys, and says that in the record and proceedings in this cause in the United States Circuit Court of Appeals, Sixth Circuit, and in the judgment of said Court made and entered on the 10th day of December, 1920, in this cause, there is manifest error in that, to-wit: the said United States Circuit Court of Appeals, Sixth Circuit, erred:

1. In affirming the action of the District Court of the United States for the Western District of Michigan, Southern Division, in sustaining the objection of defendant and refusing to permit the following question to be put to the witness, Charles P. Spicer, on his direct examination:

"Q. Was there anything that occurred there, so far as you could judge from Mrs. Dickel's appearance or actions that led you to think that her death was in any wise impending at that time?"

2. In affirming the action of said District Court in sustaining the objections of defendant and refusing to permit the plaintiff to read in evidence from the direct testimony of the deposition of Miss Maud Schell, the following question and answer:

"Q. Was there anything especially depressing her (referring to Mrs. Augusta Dickel)?"

A. No."

3. In affirming the action of said District Court in sustaining the motion of defendant and striking out the first part of the following answer in the direct testimony of the witness, Dr. William Alexander Oughterson:

"A. No, she (referring to Mrs. Dickel) never had any such thought, or if she did, she did not discuss it with me."

(Said answer being in response to the question "Did she at any time discuss with you the question of death or her apprehension about death being imminent or having to go soon, or anything like that?")

4. In affirming the action of the District Court in sustaining the objection of defendant and refusing to permit plaintiff to read in evidence from the direct examination in the deposition of Dr. William Alexander Oughterson, the following question and answer:

"Q. I want to ask you a question that is somewhat hypothetical, with reference to old persons in general, and not Mrs. Dickel in particular. Is or is not this true: That very old person, or very old persons, if they are in reasonably good health, as the years go on, they really have less immediate apprehension or danger of a near death, or departure, than young persons do, if any thing. The idea is this, to illustrate, a woman that has lived to be seventy years or eighty years, isn't it a peculiarity of those old people?"

"A. Yes, they think they are going to live right on."

5. In affirming the action of said District Court in sustaining the objection of defendant and refusing to permit plaintiff to read in evidence from the redirect examination in the deposition of Dr. William Alexander Oughterson, the following question and answer:

"Q. They are not in fear of immediate or near death, at all?

"A. Yes, they take one extreme or the other, become very pessimistic and think they are going to die, or get on the other side and if everything is going well and nothing wrong, they see no reason why they should not live on indefinitely."

6. In affirming the action of said District Court in sustaining the objection of defendant and refusing to permit plaintiff to read in evidence from the redirect examination of Dr. William Alexander Oughterson, the following question and answer:

"Q. Now, assuming that the particular individual I have in mind, I have asked you about, has reasonably good health and has no disease that is liable to carry them off, isn't it true they are liable to take the optimistic view of it?

"A. Yes."

7. In affirming the action of said District Court in sustaining the objection of defendant and refusing to permit plaintiff to read in evidence from the redirect examination of Dr. William Alexander Oughterson, the following question and answer:

"Q. And isn't that very generally the case?

"A. Yes, we see some people that develop a case of a sort of neurasthenia, so that they are apprehensive of everything. And on the other side, they feel every thing is well. Now, those are questions you could discuss, of course, almost indefinitely."

8. In affirming the action of said District Court in sustaining the objections of defendant and striking out the following answer in the direct examination of the witness, Lon S. Hager:

"A. Mrs. Shwab was in a very bad condition and they were trying to get away, and I understood they all made them together so they would not excite Mrs. Shwab."

(Said answer having been given in response to the question, "Do you know or did you hear it discussed why those three wills were executed at that time?")

9. In affirming the action of said District Court in sustaining the objections of defendant and refusing to permit the following question and answer from the deposition of the witness, Lon S. Hager, to be read in evidence:

"Q. Do I understand you have this idea, that it was thought Mrs. Shwab ought to make a will, but if she was called on alone to do so, it would excite her?

"A. Yes, sir.

10. In affirming the action of said District Court in sustaining the objections of defendant and refusing to permit the following question and answer from the direct testimony in the deposition of the witness, Lon S. Hager, to be read in evidence:

"Q. But if the others made theirs at the same time, it would be just a general business proposition?

"A. Yes, sir."

11. In affirming the action of said District Court in sustaining the objections of defendant and refusing to permit the following question and answer from the direct testimony in the deposition of the witness, Lon S. Hager, to be read in evidence:

"Q. How long was that before they were to go away?

"A. It was not very long before we went. We went about the first of June."

12. In affirming the action of said District Court in sustaining the objections of defendant and refusing to permit the following question and answer from the direct testimony in the deposition of the witness, Lon S. Hager, to be read in evidence:

"Q. So you say that it was a short time before that.

"A. Yes, sir."

13. In affirming the action of the District Court in sustaining the objections of defendant and refusing to permit the following question and answer from the direct testimony in the deposition of the witness, Lon S. Hager, to be read in evidence:

"Q. Prior to your going?

"A. Yes, sir."

14. In affirming the action of the District Court in sustaining the objections of defendant and refusing to permit the following question and answer from the direct testimony in the deposition of the witness, Lon S. Hager, to be read in evidence:

"Q. Were they, or not, apprehensive about her death (referring to Mrs. Shwab)?

"A. It was something they couldn't tell anything about, her condition."

15. In affirming the action of said District Court in sustaining the objections of defendant and refusing to permit to be read in evidence the following question and answer in the direct examination of the deposition of the witness, Victor Emanuel Shwab:

"Q. What did he report (referring to Mr. Spicer) as to his desire to proceed with the matter?

"A. He was very much pleased and said he was ready to go ahead with it."

16. In affirming the action of said District Court in sustaining the objections of defendant and refusing to permit to be read in evidence the following questions and answers of the direct testimony in the deposition of the witness, Victor Emanuel Shwab:

"Q. Did Mrs. Dickel, or any of you, have any idea or expectation that she was in danger of passing away in the near future?

"A. No, sir, you mean back in 1915?

"Q. Yes.

"A. No, not at all.

"Q. At any time in 1915?

"A. No."

17. In affirming the action of said District Court in granting the motion of defendant and striking out the following sentence in the direct testimony of the deposition of the witness, John Jacob Vertrees:

"At the same time, this deed of trust, as far as I knew or had any reason to believe, was not executed by reason of any apprehension or fear on her part of anything impending."

18. In affirming the action of said District Court in overruling the objections of plaintiff and in permitting the following question *question* to be put in cross-examination to the witness, Victor Emanuel Shwab:

"Q. Up to that time—up to the creation of this trust instrument in April, 1915, and the turning over of this million dollars of bonds to the Detroit Trust Company under that instrument, what taxes had you, for Mrs. Dickel, or she herself, directly or indirectly, paid in Tennessee or anywhere else upon those bonds or holdings?"

19. In affirming the action of said District Court in taking the answers of said witness, Victor Emanuel Shwab, to the last question, and allowing them to stand.

20. In affirming the action of said District Court in overruling the objections of plaintiff and permitting the following question to be put in cross-examination to witness, Victor Emanuel Shwab:

"Q. From the time the trust instrument was made, in April, 1915, or the securities delivered in June, I guess they were, because they were formally acknowledged in June, 1915, up to Mrs. Dickel's death, in September, 1916, where had you kept the income that you received from the Detroit Trust Company, where did you put it?"

21. In affirming the action of said District Court in taking the answers of said witness, Victor Emanuel Shwab, to the last question, and allowing them to stand.

22. In affirming the action of said District Court in overruling the objections of plaintiff and permitting the following question to be put in cross-examination to the witness V. E. Shwab:

"Q. I am speaking now of what took place between June or April, 1915, when the agreement was executed, and her death; is it not a fact that the income, the interest and income from those bonds and other securities, \$500,000, approximately, that you and she still owned jointly, was collected by you after the trust agreement was made, up to the time of her death, was put in the same account as the income you received from the Detroit Trust Company precisely; isn't that the fact?"

23. In affirming the action of said District Court in taking the answers of said witness V. E. Shwab to the last question and allowing them to stand.

24. In affirming the action of said District Court in overruling the objections of plaintiff and permitting the following question to be put to the witness V. E. Shwab in cross-examination:

"Q. You do recall, do you not, though, that under that trust agreement, Mrs. Dickel reserved the income of this trust fund, this million dollars of bonds that she was turning over to herself, for her lifetime, that she was to have the income for her lifetime; you recall that; don't you?"

25. In affirming the action of said District Court in taking the answer of said witness V. E. Shwab to the last question and allowing it to stand.

26. In affirming the action of said District Court in overruling the objections of plaintiff and permitting the following questions to be put in cross-examination of the witness V. E. Shwab:

"Q. Do you recall that you included in that return, as part of her income, the sum of 18,000 and some odd dollars, being the total amount that you had received from the Detroit Trust Company?"

"Q. Up to that time, as the income on these bonds, do you recall that?"

27. In affirming the action of said District Court in taking the answers of said witness V. E. Shwab to the last questions, and allowing them to stand.

28. In affirming the action of said District Court in overruling the objections of plaintiff to the acceptance in evidence of defendant's Exhibit "1".

29. In affirming the action of said District Court in overruling the objections of plaintiff to the acceptance in evidence of defendant's Exhibit "2".

30. In affirming the action of said District Court in overruling the objections of plaintiff and in receiving in evidence on the direct examination of the witness Hume Jones and other witnesses of defendant, testimony relating to notices, assessments, schedules and other matters pertaining to the assessment and payment of local taxes in Tennessee by Augusta Dickel, Victor E. Shwab and George A. Dickel & Company, and other testimony of a similar nature.

31. In affirming the action of said District Court in overruling the objections of plaintiff and in permitting the following question to be put on direct examination to the witness A. D. Bell:

"Q. What taxes did Augusta Dickel pay on personalty during these years?"

32. In affirming the action of said District Court in taking the answers of said witness A. D. Bell to the last question, and allowing it to stand.

33. In affirming the action of said District Court in overruling the objections of plaintiff and in receiving in evidence, on the examination of the witness A. D. Bell and other witnesses of defendant, testimony relating to the payment of taxes on personalty in Tennessee by Mrs. Augusta Dickel, Victor E. Shwab or George A. Dickel & Company during the years 1912 to 1916 inclusive.

34. In affirming the action of said District Court in overruling the objections of plaintiff and in permitting the following question to be put to the witness Vernon H. Sharp, on direct examination.

"Q. I will ask you what personalty—I will ask you first, was Augusta Dickel assessed any personalty during any of those years 1912 to 1915, upon the city tax rolls or assessment rolls of the city of Nashville?"

35. In affirming the action of said District Court in taking the answers of said witness, Vernon H. Sharp, to the last question and allowing them to stand.

36. In affirming the action of said District Court in overruling the objections of plaintiff and permitting the following question to be put to the witness Vernon H. Sharp on direct examination:

"Q. Now, to return to the question I asked: Were George A. Dickel & Company assessed any personalty upon the assessment rolls of the city of Nashville from 1912 to 1916 inclusive, other than what is called the ad valorem assessment for the merchant stock?"

37. In affirming the action of said District Court in taking the answers of said witness, Vernon H. Sharp to the last question and permitting them to stand.

38. In affirming the action of said District Court in sustaining the objection of defendant and in refusing to permit plaintiff to put the following question on cross-examination to the witness, Vernon H. Sharp:

"Q. You sent out, you say, about three thousand of those requests for return of personal property. In answer to those three thousand requests, how many returns of personal property for assessment did you get from these persons to whom these notices are sent?"

39. In affirming the action of said District Court in sustaining the objections of defendant and in refusing to permit plaintiff to put the following question on cross-examination to the witness G. A. Geer:

"Q. You also heard Dr. Armstrong say, did you not, upon his cross-examination by Mr. Walker, that he could not recollect that he had ever taken Mrs. Dickel's blood pressure at any time prior to this time when she had her seizure, shortly before her death?"

40. In affirming the action of said District Court in denying plaintiff's motion that a verdict be directed for the plaintiff.

41. In affirming the action of said District Court in refusing to charge the jury as requested by the plaintiff, as follows:

"Upon the undisputed proofs, your verdict must be for plaintiff in this cause."

The same being plaintiff's first request to charge.

42. In affirming the action of said District Court in refusing to charge the jury as requested by the plaintiff, as follows:

"Upon the undisputed proofs in this cause, you are instructed to find a verdict in favor of the plaintiff and against the defendant, for the amount paid by plaintiff to defendant under protest, for estate tax, upon transfer of date April 21, 1915, made by Augusta Dickel to Detroit Trust Company, the amount of such estate tax being \$56,546.41; and in arriving at your verdict you will also add interest on said sum at five per cent (5%) per annum from December 15, 1917, the date of such payment down to the present time."

The same being plaintiff's second request to charge.

43. In affirming the action of said District Court in refusing to charge the jury, as requested by plaintiff, as follows:

"The deed of trust of date April 21, 1915, took effect on its execution and delivery in or about April, 1915. It did not take effect at or after Mrs. Dickel's death, but more than a year prior thereto, and also more than a year prior to the enactment by Congress of the Estate Tax Law. Forthwith upon delivery of the instrument, the legal title to the securities described in the trust deed passed from Mrs. Dickel to the Detroit Trust Company and vested in it. I therefore charge you that the defendant has no defense to this suit under that provision of the Act of Congress relating to the making of transfers or the creation of trusts to take effect in possession or enjoyment at or after the death of decedent."

The same being plaintiff's third request to charge.

44. In affirming the action of said District Court in refusing to charge the jury, as requested by the plaintiff, as follows:

"The Act of Congress of September 8, 1916, provides, in substance, that the value of the gross estate of the decedent shall be determined by including the value at the time of her death, of all property, real or personal, to the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which she has created a trust in contemplation of death. I charge you that the words "in contemplation of death" do not refer to that general expectation of death which every mortal entertains, but rather the apprehension which arises from some existing condition of the body or some impending peril."

The same being plaintiff's fourth request to charge.

45. In affirming the action of said District Court in refusing to charge the jury, as requested by plaintiff, as follows:

"If you find that when Mrs. Dickel made the deed of trust in question, she was an old woman, somewhat enfeebled, as a result of old age, and that she must have known that she could not live many years longer, yet if you further find that she was then under no apprehension of death arising from some existing condition of body or some impending peril, I charge you that the deed of trust was not made by her "in contemplation of death," within the meaning of that phrase, as used in the Act of Congress."

The same being plaintiff's fifth request to charge.

46. In affirming the action of said District Court in refusing to charge the jury, as requested by plaintiff, as follows:

"It appears that Mrs. Dickel made the transfer to the Detroit Trust Company in or about the month of April, 1915, and that the Act of Congress, known as the Estate Tax Law, was not passed until September 8, 1916, I charge you, therefore, that there is no proof in this case tending to show that the transfer made by Mrs. Dickel to the Detroit Trust Company was made for the purpose of defrauding or evading the Federal Revenue Law."

The same being plaintiff's sixth request to charge.

47. In affirming the action of said District Court in refusing to charge the jury, as requested by plaintiff, as follows:

"In determining whether the transfer by Mrs. Dickel to the Detroit Trust Company was or was not made 'in contemplation of death' within the meaning of the statute, one of the elements proper to be considered is whether there was or was not an intent on the part of Mrs. Dickel to escape or avoid payment of the Estate Tax. Inasmuch as the Estate Tax Law was not passed by Congress until some sixteen months after the making of the transfer, I instruct you that this element of intent to escape or avoid the payment of the Estate Tax is wholly wanting in the suit at bar, and this is a circumstance which you are entitled to consider in arriving at your conclusion as to whether the transfer by Mrs. Dickel was or was not made in contemplation of death."

The same being plaintiff's seventh request to charge.

48. In affirming the action of said District Court in refusing to charge the jury, as requested by plaintiff, as follows:

"There is proof in this case tending to show that one purpose of the transfer made by Mrs. Dickel to the Detroit Trust Company was that the Detroit Trust Company was a corporation organized under the Michigan laws, and doing business in this State, and that, by virtue of the transfer so made, it would be possible to take advantage of the Michigan Statute, whereby securities of the character of those specified in the trust deed could be exempted from taxation upon paying to the County Treasurer of the proper county a tax of one-half of one per cent, under the Michigan laws. I charge you that Mrs. Dickel was lawfully entitled to make the transfer to the Detroit Trust Company, with the intent and for the purpose of thus availing herself of the benefits of this Michigan tax law, or to enable the beneficiaries under the deed of trust to procure for themselves that advantage."

The same being plaintiff's eighth request to charge.

49. In affirming the action of said District Court in refusing to charge the jury, as requested by plaintiff, as follows:

"The Act of Congress provides that any transfer of a material part of the decedent's property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to her death, without a fair consideration in money or money's worth, shall, unless shown to the contrary, be deemed to have been made in contemplation of death, within the meaning of the Act. I instruct you that this does not mean that if the transfer is made within two years prior to the death of the decedent, it will be conclusively presumed that the transfer was made in contemplation of death, but only that if all the conditions recited in the Act exist, the burden of proof is shifted and there is raised, by the terms of the law, a presumption that the transfer is made in contemplation of death. In other words, if the transfer is of 'a material part' of decedent's property; if it is 'in the nature of a final disposition or distribution thereof;' and if it is made 'within two years prior to his death' without consideration, it is not even then declared to be made 'in contemplation of death.' The Act merely declares that 'unless shown to the contrary' it shall, in such case, be deemed to have been made 'in contemplation of death.' But this is a presumption merely and may be rebutted by proofs in the cause, and I instruct you that if the plaintiff has shown, by a preponderance of evidence, that when Mrs. Dickel made the deed of trust in question she had only the general expectation of all rational mortals that she would die some time, but that she was then laboring under no apprehension of death arising from some existing infirmity or impending peril, the deed in question was not made 'in contemplation of death' within the meaning of those words, as used in the Act of Congress."

The same being plaintiff's ninth request to charge.

50. In affirming the action of said District Court in refusing to charge the jury, as requested by plaintiff, as follows:

"There is testimony to the effect that in making Mrs. Dickel's income tax return for 1915, signed by Mr. Shwab in her behalf, there was included interest received during that

year upon the securities in the hands of the Detroit Trust Company. Mr. Shwab has testified that this was done by mistake. I charge you that the fact that this item of interest was so included in the tax return for that year signed by Mr. Shwab for Mrs. Dickel does not tend to show that the deed of trust of date of April 21, 1915, made by Mrs. Dickel to the Detroit Trust Company, and executed and delivered more than a year before her death, was intended to take effect or did take effect at or after her death, nor does it tend to show that it was made by her in contemplation of death."

The same being plaintiff's tenth request to charge.

51. In affirming the action of said District Court in refusing to charge the jury, as requested by plaintiff, as follows:

"I instruct you that the Act of Congress of September 8, 1916, is not retrospective in character, and that it does not impose a tax upon the deed of trust of date April 21, 1915, executed and delivered by Augusta Dickel to the Detroit Trust Company before the enactment of the law."

The same being plaintiff's eleventh request to charge.

52. In affirming the action of said District Court in refusing to charge the jury, as requested by plaintiff, as follows:

"I instruct you that if the Act of September 8, 1916, could be construed to be retrospective and to impose a tax upon the transfer of April 21, 1915, it would be unconstitutional and void as a denial of due process of law, and the taking of private property for public use without compensation, contrary to the Fifth Amendment to the Constitution of the United States."

The same being plaintiff's twelfth request to charge.

53. In affirming the action of said District Court in charging the jury as follows:

"The law authorized the taking into consideration, in certain instances and under certain conditions, of property which had been transferred absolutely, prior to the death of the person making the transfer, in arriving at the amount of the tax which was to be computed."

54. In affirming the action of said District Court in charging the jury as follows:

"Among other provisions of the law was one which, in substance, authorized the taking into consideration by the Tax Collector or the Commissioner of Internal Revenue, in levying the tax, property which had been transferred without consideration, that is, as a gift, at any time prior to the death of the person making the transfer, provided that such transfer when it was made, was made in contemplation of death."

55. In affirming the action of said District Court in charging the jury as follows:

"That presents the sole question for your determination: Did Mrs. Dickel, in April, 1915, transfer to the Detroit Trust Company the trust property in contemplation of death, that is to say, at the time of making the transfer, did she have in contemplation her own death, and was that the reason for making the transfer to the Detroit Trust Company."

56. In affirming the action of said District Court in charging the jury as follows:

"On the other hand, the meaning of the term ('in contemplation of death') is not necessarily limited to an expectancy of immediate death or a dying condition. We speak of gifts causa mortis, that is, gifts made because the person is in death or is dying. That condition is not what is meant."

57. In affirming the action of said District Court in charging the jury as follows:

"Nor is it necessary in order to constitute a transfer in contemplation of death, that the conveyance or transfer be made while death is imminent; while it is immediately pending by reason of bodily condition, ill health, disease or injury or something of that kind."

58. In affirming the action of said District Court in charging the jury as follows:

"But a transfer may be said to be made in contemplation of death if the expectation or anticipation of death in either

immediate or reasonably distant future is the moving cause of the transfer."

59. In affirming the action of said District Court in charging the jury as follows:

"And in this case, if you find that Mrs. Dickel, in April, 1915, was moved to create a trust and to make the transfer to the Detroit Trust Company by her expectation or anticipation of death in either the immediate or the reasonably distant future, then you will be warranted in finding that this transfer was made in contemplation of death."

60. In affirming the action of said District Court in charging the jury as follows:

"In determining that question, you have a right to take into consideration all the evidence in the case. You have the right also to take into consideration the provisions of the statute which Congress has enacted in that regard, and upon that subject the statute is this: Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death, without consideration, shall unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title. By that statute Congress created a rule of evidence merely. That statute raises a presumption that if a transfer is made within two years of the death of the person making the transfer, it is presumed to have been made in contemplation of death, unless the contrary is shown; and the burden in this case is upon the plaintiff to establish by a fair preponderance of the evidence, taking into consideration the presumption which the statute creates, that this transfer was not made by Mrs. Dickel in contemplation of her death."

61. In affirming the action of said District Court in charging the jury as follows:

"Take into consideration any other instruments, like wills that were executed about the same time."

62. In affirming the action of said District Court in charging the jury as follows:

"Take into consideration all these matters and then say from the evidence in the case, bearing in mind the presumption which the statute raises and giving it the consideration to which it is entitled, and it is to be considered by you in connection with the other evidence in the case, whether or not that transfer by Mrs. Dickel to the Detroit Trust Company at that time was made by her in contemplation of her death."

63. In affirming the action of said District Court in charging the jury as follows:

"On the other hand, if you find, from the evidence and all the evidence in the case, that the moving cause of that transfer was her expectation and anticipation of death, it will be your duty to find that the transfer was made in contemplation of death."

64. In affirming the action of said District Court in denying the plaintiff's motion for a new trial.

65. In affirming the judgment of the District Court for the Western District of Michigan, Southern Division and in denying all and singular plaintiff's assignments of error with respect thereto.

66. In holding that Title II of the Act of September 8, 1916 (39 Stat. at L. 463) was intended to reach absolute conveyances in contemplation of death made before the passage of the Act.

67. In holding that said Act when so intended is not unconstitutional and is not unconstitutional as applied to the trust deed of April 21, 1915, executed by Augusta Dickel to the Detroit Trust Company and that said Act of Congress as so construed is not void as denying due process of law or as violating the Fifth Amendment to the Constitution, but is within the taxing power of Congress and would not be classified as a direct tax.

68. In holding that the definition of transfer in contemplation of death given to the jury by the Trial Judge, viz.: "A transfer may be said to be made in contemplation of death if the expectation or anticipation of death in either the immediate or reasonably distant future is the moving

cause of the transfer" is correct, and in holding that a time which is only reasonably distant is reasonably close.

69. In holding that plaintiff's assignments of error 58 and 59 relative to the use of the word "distant" instead of the word "close" in connection with the word "future" in said definition of the Trial Judge were not based upon sufficient exceptions.

70. In holding that there was sufficient evidence for the jury to hold that the transfer of Augusta Dickel to the Detroit Trust Company of date April 21, 1915, was made "in contemplation of death" within the meaning of the statute.

71. In holding that the presumption afforded by Section 202(b) of said Act was evidence to be considered by the jury.

By reason whereof plaintiff in error prays that the judgment aforesaid may be reversed, etc.

WILLARD F. KEENEY,
JOHN J. VERTREES,
Attorneys for Plaintiff.

Prayer for Reversal.

(Filed Dec. 29, 1920.)

The plaintiff in error, above named, by Willard F. Keeney and John J. Vertrees, his attorneys, avers that the judgment of the United States Circuit Court of Appeals, Sixth Circuit, made and entered on the 10th day of December, 1920, is erroneous and not in accordance with law and justice, and would deprive the plaintiff in error of his just rights in the premises and of his rights under the Constitution of the United States, and that said plaintiff in error feels aggrieved thereby and respectfully prays that the same be reversed, and such other relief be given said plaintiff in error as may be proper in the premises.

WILLARD F. KEENEY,
JOHN J. VERTREES,
Attorneys for Plaintiff in Error.

Dated December 28, 1920.

Bond.

(Filed Dec. 29, 1920.)

Know all men by these presents, that we, Victor E. Shwab, executor of the last will and testament of Augusta Dickel, deceased, as principal, and Willard F. Keeney and Julius H. Amberg, as sureties, are held and firmly bound unto Emanuel J. Doyle, United States Collector of Internal Revenue for the Fourth Collection District of Michigan in the full and just sum of One Thousand (1,000) Dollars to be paid to the said Emanuel J. Doyle, United States Collector of Internal Revenue for the Fourth Collection District of Michigan, his certain attorneys, executors, administrators or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Scaled with our seals, and dated this 28th day of December, in the year one thousand nine hundred and twenty.

Whereas, lately at a term of the United States Circuit Court of Appeals, Sixth Circuit, in a suit pending in said Court between Victor E. Shwab, executor of the last will and testament of Augusta Dickel, deceased, as plaintiff in error and Emanuel J. Doyle, United States Collector of Internal Revenue for the Fourth Collection District of Michigan, as defendant in error, a judgment was rendered against said plaintiff in error and for the said defendant in error affirming the judgment made and entered in said cause in the District Court of the United States for the Western District of Michigan, Southern Division; and the said Victor E. Shwab, executor of the last will and testament of Augusta Dickel, deceased, having obtained a writ of error from the Supreme Court of the United States to the United States Circuit Court of Appeals, Sixth Circuit, to reverse the judgment in the aforesaid suit;

Now, therefore, the condition of this obligation is such that if the said Victor E. Shwab, executor of the last will and testament of Augusta Dickel, deceased, shall prosecute his said writ of error to effect, and will answer all damages

and costs if he fail to make his plea good, then this obligation to be void; otherwise to remain in full force and virtue.

VICTOR E. SHWAB,

Executor of the Last Will and Testament

of Augusta Dickel, Deceased,

By WILLARD F. KEENEY,

His Attorney.

WILLARD F. KEENEY.

JULIUS H. AMBERG.

UNITED STATES OF AMERICA,

Western District of Michigan,

County of Kent, ss:

Willard F. Keeney and Julius H. Amberg, being severally sworn, do depose and say, each for himself, that he is worth a sum in excess of Five Thousand (5,000) Dollars.

WILLARD F. KEENEY.

JULIUS H. AMBERG.

Subscribed and sworn to before me this 28th day of December, 1920.

HARRIET L. MARTIN,

Notary Public, Kent County, Michigan.

My commission expires Dec. 6, 1922.

Approved by me this 28th day of December, 1920.

[SEAL.]

LOYAL E. KNAPPEN,

U. S. Circuit Judge, Sixth Circuit.

Proof of Service.

(Filed Dec. 30, 1920.)

WESTERN DISTRICT OF MICHIGAN,

Southern Division,

County of Kent, ss:

Julius H. Amberg, being duly sworn, deposes and says that he is an attorney at law and a co-partner in the firm of Butterfield, Keeney & Amberg, of which firm Willard F. Keeney, one of the attorneys for the plaintiff in error

herein is a member, and that on the 28th day of December, A. D. 1920, in behalf of the plaintiff in error herein, he served upon Myron H. Walker, United States District Attorney, and attorney for the defendant in error herein, copies of the following papers filed herein, viz.:

(1) Petition of date December 28th, 1920, for writ of error from the Supreme Court of the United States to the United States Circuit Court of Appeals, Sixth Circuit, together with order signed by United States Circuit Judge, Loyal E. Knappen, made on the 28th day of December, 1920, allowing said writ of error and approving bond on error as a supersedeas bond.

(2) Assignments of error filed herein on December 28, 1920.

(3) Prayer for reversal filed herein on December 28, 1920.

(4) Bond on error filed herein December 28, 1920, approved by United States Circuit Judge, Loyal E. Knappen.

The service of the copies of the above papers was made upon said Myron H. Walker on the above date in the city of Grand Rapids, Michigan, by handing the same personally to Ella M. Backus at the office of said Myron H. Walker in the Federal Building in said city of Grand Rapids, said Ella M. Backus having charge of his office in his absence.

JULIUS H. AMBERG.

Subscribed and sworn to before me this 29th day of December, 1920.

[SEAL.]

HARRIET L. MARTIN,
Notary Public, Kent County, Michigan.

My commission expires Dec. 6, 1922.

Acknowledgment of Service.

(Filed Dec. 31, 1920.)

I hereby acknowledge service upon the 28th day of December, 1920, of copies of the following papers in the above entitled cause:

(1) Petition of date December 28, 1920, of plaintiff in error for a writ of error from the Supreme Court of the

United States to the United States Circuit Court of Appeals, Sixth Circuit, together with order signed by Judge Knappen allowing writ of error and approving bond as supersedeas.

(2) Assignments of error of date December 28, 1920.

(3) Prayer for reversal of date December 28, 1920.

(4) Bond on writ of error of date December 28, 1920.

I also acknowledge service upon December 30, 1920, of citation on writ of error in the above cause.

Dated December 30, 1920.

MYRON H. WALKER,
*United States Attorney and
Attorney for Defendant in Error.*

Proof of Service of Copy of Writ of Error.

(Filed Jan. 3, 1921.)

WESTERN DISTRICT OF MICHIGAN,
*Southern Division,
County of Kent, ss:*

Julius H. Amberg, being duly sworn, deposes and says that in behalf of the plaintiff in error herein, he served a copy of the writ of error herein, issued on December 29, 1920, upon Myron H. Walker, attorney for defendant in error, said service being made on the 31st day of December, 1920, by handing the same to said Myron H. Walker, personally, in his office in the city of Grand Rapids, Michigan.

JULIUS H. AMBERG.

Subscribed and sworn to before me this 31st day of December, A. D. 1920.

[SEAL.]

HARRIET L. MARTIN,
Notary Public, Kent County, Mich.

My commission expires Dec. 6, 1922.

Præcipe for Transcript.

(Filed Jan. 3, 1921.)

To the clerk of United States Circuit Court of Appeals, Sixth Circuit.

SIR:

You will please incorporate into the transcript of the record for return herein, the following portion of the files and records in this suit:

1. The transcript of record in this cause filed in the United States Circuit Court of Appeals, Sixth Circuit.
2. Opinion of the Circuit Court of Appeals, Sixth Circuit.
3. Judgment of the Circuit Court of Appeals, Sixth Circuit.
4. Writ of error from the Supreme Court of the United States to the Circuit Court of Appeals, Sixth Circuit.
5. Citation on said writ of error.
6. Petition of plaintiff in error for writ of error from Supreme Court of United States.
7. Order allowing said petition and approving bond as supersedeas.
8. Prayer for reversal in Supreme Court of United States.
9. Assignments of error in Supreme Court of United States.
10. Bond on writ of error from Supreme Court of United States.
11. Proofs and acknowledgment of service of various papers pertaining to writ of error.
12. All further proceedings relative to the writ of error from Supreme Court of United States, etc., including this præcipe.

Dated December 31, 1920.

Yours, etc.,

WILLARD F. KEENEY,
JOHN J. VERTREES,
Attorneys for Plaintiff in Error.

I hereby acknowledge due personal service of a copy of the foregoing præcipe and hereby join therein.

MYRON H. WALKER,
*United States Attorney and
Attorney for Defendant in Error.*

Dated December 31, 1920.

Filed Dec. 29, 1920. Arthur B. Mussman, clerk.

UNITED STATES OF AMERICA, ss.:

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals, Sixth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between Victor E. Shwab, executor of the last will and testament of Augusta Dickel, deceased, plaintiff in error and Emanuel J. Doyle, United States Collector of Internal Revenue for the Fourth Collection District of Michigan, defendant in error, a manifest error hath happened, to the great damage of the said Victor E. Shwab executor of the last will and testament of Augusta Dickel, deceased, the said plaintiff in error as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to cor-

rect that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 29th day of December, in the year of our Lord one thousand nine hundred and twenty.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

ARTHUR B. MUSSMAN,
*Clerk of the United States Circuit Court
of Appeals, Sixth Circuit.*

Allowed by
LOYAL E. KNAPPEN,
*Circuit Judge of the United States Circuit
Court of Appeals, Sixth Circuit.*

Return on Writ of Error.

United States Circuit Court of Appeals for the Sixth Circuit.

In pursuance of the command of the within writ of error, I, Arthur B. Mussman, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby transmit, under the seal of said court, a true, full and complete copy of the record and proceedings of said court in the cause and matter in said writ of error stated, together with all things concerning the same.

Witness my official signature and the seal of said Court, at Cincinnati, Ohio, in said Circuit this fourth day of January, A. D., 1921, and in the 145 year of the Independence of the United States of America.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

ARTHUR B. MUSSMAN,
*Clerk United States Circuit Court
of Appeals for the Sixth Circuit.*

UNITED STATES OF AMERICA, ss:

To Emanuel J. Doyle, United States Collector of Internal Revenue for the Fourth Collection District of Michigan, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States Circuit Court of Appeals, Sixth Circuit, wherein Victor E. Shwab, executor of the last will and testament of Augusta Dickel, deceased, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Loyal E. Knappen, Circuit Judge of the United States Circuit Court of Appeals, this thirtieth day of December, in the year of our Lord one thousand nine hundred and twenty.

LOYAL E. KNAPPEN,
*Circuit Judge of the United States Circuit
Court of Appeals, Sixth Circuit.*

[Endorsed:] 3364. Citation. Filed Dec. 31, 1920. Arthur B. Mussman, clerk.

On this 30th day of December, in the year of our Lord one thousand nine hundred and twenty, personally appeared Julius H. Amberg before me, the subscriber, a Notary Public in and for Kent County, Michigan, and makes oath that he delivered a true copy of the within citation to Myron H. Walker, United States District Attorney and attorney for the within-named defendant in error, upon the 30th day of December, 1920, by handing the same to said Myron H. Walker personally in his office in the city of Grand Rapids, Michigan.

JULIUS H. AMBERG.

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Sworn to and subscribed the 30th day of December, A. D. 1920.

[Seal of Harriet L. Martin, Notary Public, Kent County, Mich.]

HARRIET L. MARTIN,
Notary Public, Kent County, Michigan.

My commission expires Dec. 6, 1922.

United States Circuit Court of Appeals for the Sixth Circuit.

I, Arthur B. Mussman, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of Victor E. Schwab, Executor, etc., vs. Emanuel J. Doyle, collector, etc., No. 3364, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof, together with the original writ of error and citation.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the city of Cincinnati, Ohio, this 4th day of January, A. D. 1921.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

ARTHUR B. MUSSMAN,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

Endorsed on cover: File No. 28,038. U. S. Circuit Court Appeals, 6th Circuit. Term No. 681. Victor E. Schwab, executor of the last will and testament of Augusta Dickel, deceased, Plaintiff in Error, vs. Emanuel J. Doyle, United States collector of internal revenue for the fourth collection district of Michigan. Filed January 15th, 1921. File No. 28,038.

Office Supreme Court, U. S.

FILED

APR 10 1922

WM. A. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921; No. 200

VICTOR E. SHWAB, Executor of the Last Will and
Testament of Augusta Dickel, Deceased,

Plaintiff in Error,

VS.

EMANUEL J. DOYLE, United States Collector of
Internal Revenue for the Fourth Collection
District of Michigan,

Defendant in Error.

*In Error to the United States Circuit Court of Appeals
for the Sixth Circuit.*

BRIEF OF AMICUS CURIAE.

GARRET W. McENERNEY,
Amicus Curiae.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921; No. 200

VICTOR E. SHWAB, Executor of the Last Will and
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Plaintiff in Error,

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Defendant in Error.

*In Error to the United States Circuit Court of Appeals
for the Sixth Circuit.*

BRIEF OF AMICUS CURIAE.

This brief deals with (1) the history and meaning of the term "in contemplation of death"; and (2) the erroneous assumption of the Circuit Court of Appeals that the Internal Revenue Act of 1864 taxed past transfers, and that the Estate Tax Act of 1916 is similar in scope and effect to the Act of 1864.

PART ONE.

1. Introduction.

The question whether a transfer has been made "in contemplation of death" is a question of fact; but the meaning of the term is a question of law.

The trial court refused to direct a verdict for the plaintiff, and submitted the question of fact to the jury. The Circuit Court of Appeals held in terms that the evidence "doubtless would" have supported a verdict that the transfer was not made in contemplation of death (269 Fed. 331, foot), but ruled that the case was not one for a directed verdict inasmuch as the evidence favorable to the defendant, including the statutory presumption as a part of the evidence, was sufficient to submit to the jury.

After the trial court had denied the plaintiff's motion for a directed verdict, the plaintiff requested that the following instruction be given to the jury:

"The words 'in contemplation of death' do not refer to that general expectation of death which every mortal entertains, but rather the apprehension which arises from some existing condition of body or some impending peril."

The court refused plaintiff's request and gave the following instruction instead:

"By the term 'in contemplation of death' is not meant on the one hand the general expectancy of death which is entertained by all persons, for every person knows that he must die. . . . On the other hand, the meaning of the term is not necessarily limited to an expectancy of immediate death

or a dying condition. . . . The term 'in contemplation of death' involves something between these two extremes. Nor is it necessary, in order to constitute a transfer in contemplation of death, that the conveyance or transfer be made while death is imminent, while it is immediately impending by reason of bodily condition, ill health, disease, or injury, or something of that kind. But a transfer may be said to be made in contemplation of death if the expectation or anticipation of death in either the immediate or reasonably distant future is the moving cause of the transfer."

As we have said, the meaning of the term "in contemplation of death" is a question of law, although the question whether a particular transfer comes within the term is one of fact. Therefore reversible error has occurred [a] if a proper definition of the term was requested by the plaintiff, and the trial court refused to give it to the jury; or [b] if the trial court improperly defined the term to the jury; or [c] if, in defining the term to the jury, the trial court fixed a standard which is impossible of application because of its uncertainty.

When the words "in contemplation of death" were first introduced into transfer tax legislation, they had acquired a well defined meaning in consequence of their habitual employment in the law of gifts *causa mortis*.¹ The term was codified in the provisions covering the law

(1) For the antiquity of gifts *causa mortis* see "The Institutes of Justinian", With English Introduction, Translation and Notes by Thomas Collett Sandars; First Am., From the 5th London Edition, With an Introduction by Wm. G. Hammond (1876); pp. 217-221.

of gifts in "The Civil Code of the State of New York" (prepared for adoption in 1865 by David Dudley Field and Alexander W. Bradford, but never adopted) familiarly known as the "Field Code". These provisions were copied in the Civil Code of California in 1873, and later in the statutory laws of North Dakota, South Dakota and Montana.

The first appearance of the words "in contemplation of death" in transfer tax legislation is in the New York Statute of 1891 (Laws of New York, 1891, p. 409, c. 215). They next appear in California in 1893 (Stats. Cal., 1893, p. 193), and in Illinois in 1895 (Stats. Ill. 1895, p. 301).

Provisions taxing transfers in contemplation of death are now included in the transfer tax laws of a large number of states, but we mention New York, California and Illinois, particularly, because they first adopted the provision and because their decisions embody the prevailing definition of the term. In some states the term "in contemplation of death" has been defined by statute, as, in California (Stats. Cal. 1911, § 27, p. 726), where two definitions now obtain: (a) the "commonly accepted" one, and (b) the *broader* "statutory definition of the phrase" (Estate of Minor, 180 Cal. 291, 294). The former governs transfers made before July 1, 1911, when the statutory definition was adopted, and subsequent transfers are governed by the latter (*Estate of Pauson*, 199 Pac. 331, Sup. Ct. Cal. 1921). *Estate of Reynolds*, 169 Cal. 600, 147 Pac. 268 (1915), declared that the statutory definition merely elucidated without chang-

ing the existing law, but *Estate of Pauson* holds to the contrary, and points out that the statement in the Reynolds case was dictum, inasmuch as the transfer involved therein had been made before the statutory definition was enacted.

The act of September 8, 1916, employs the words without definition. It takes them as they appear when first introduced into the state laws, and with the meaning given them in the state decisions.

Although there are many decisions in a number of states in which the term "in contemplation of death" has been considered or defined, the present case is the first one in which a federal court has been called upon to define the term. The case is one of particular importance not only for its bearing upon the administration of the federal estate tax act, but also for the effect that a decision of this court will have upon the established law in the several states.

As we have said, when the term "in contemplation of death" first appeared in a transfer tax statute, it had acquired a well-defined legal meaning in consequence of its habitual employment in the law of gifts *causa mortis*. Accordingly, it was early held in New York that gifts in contemplation of death were limited to gifts *causa mortis*, namely, gifts revocable in terms, or gifts made *in extremis* to which a presumption of revocability attached. Later, when the question was presented as to whether a limitation of transfers in contemplation of death to gifts *causa mortis* would allow irrevoc-

cable gifts to go untaxed, it was held that such gifts were taxable, although irrevocable, if made under apprehension of impending death, due to some existing illness, infirmity, or peril.

It has thus come to be held that the term embraces irrevocable as well as revocable gifts, provided they are made "*when the donor is looking forward to his death as impending.*"² This definition was first given in Illinois in 1904;³ it has been followed in the later New York cases and in the California decisions; and it is now the generally accepted and prevailing definition.

This court has indicated its recognition of the fact that death must be *impending* if a gift is to be held to have been made in contemplation of death, for in describing the transfer tax law of New York, it was here said:

"The . . . statute . . . imposes a tax on transfers by descent, or will, which take effect at the death of the testator; and then a tax upon transfers made in contemplation of death. It was but logical to take the next step, and tax transfers intended to take effect at or after the death of the grantor, even though that event was not actually *impending* when the deed was signed."

Keeney v. New York, 222 U. S. 525, 536 (1912).

(2) Murray's New English (Oxford) Dictionary defines the word "*impending*" as follows: "Overhanging, about to fall or happen, imminent, near at hand". The Century Dictionary defines "*impend*" as "to be ready to fall, to be imminent, to threaten, to be on the point of occurring".

(3) *Rosenthal v. People*, 211 Ill. 306, 71 N. E. 1121.

In determining whether a transfer has been made in contemplation of death, it is obvious that some standard must be adopted which is free from uncertainty and capable of general application. In the present case, the trial court charged the jury that if "anticipation of death in either the immediate or reasonably distant future is the moving cause of the transfer", it may be taxed as one made in contemplation of death.

It is difficult to say what the court meant by this instruction. It is more difficult to say what meaning was given to it by the jury. But in any event, the most that can be said for the instruction is that it is equivalent to a charge that if the donor was actuated by the belief that she would die *within a reasonable time*, the gift was taxable. But what is a reasonable time? No limit is given for the period, no factors are enumerated by which the period is to be determined, and no standard is fixed for the jury which their experience enables them to apply. Did the court mean that the life expectancy of the grantor⁴ constituted a reasonable time?⁵ And did it mean to advise the jury that if the grantor believed she would outlive her life expectancy the gift would be nontaxable, but that if she did not so believe, the gift would be taxable?

(4) The grantor was born in 1838, made the transfer in 1915 (when her life expectancy was 5.48 years), and died September 16, 1916.

(5) The life expectancies of persons between the ages of 70 and 90 are shown in the following Mortality Tables (taken from

If it were provided that all gifts made by a donor after a certain age should be taxed as transfers deemed to have been made in contemplation of death, there would be a fixed formula, but no such provision has ever been enacted. It is true that laws have been passed whereby gifts made within a named period before death are either rebuttably or conclusively presumed to have been made in contemplation of death. A law providing a conclusive presumption furnishes an exact formula, but it has the vice of arbitrarily including all transfers without reference to apprehension of death, and of creating the intolerable situation of not letting it be known whether an event is taxable until long after the event has occurred.

Rev. Stat. N. Y. [Banks', 7th Ed.] Vol. 2, p. 1497; see 20 A. & E. Encyc., p. 885):

Age	Expectation of Life
70.....	8.48
71.....	8.00
72.....	7.54
73.....	7.10
74.....	6.68
75.....	6.28
76.....	5.88
77.....	5.48
78.....	5.10
79.....	4.74
80.....	4.38
81.....	4.04
82.....	3.71
83.....	3.39
84.....	3.08
85.....	2.77
86.....	2.47
87.....	2.19
88.....	1.93
89.....	1.69
90.....	1.42

In the absence of a statutory provision fixing a formula, the situation can only be met by adhering to the rule that *a transfer is made in contemplation of death when the grantor is moved to make the gift by apprehension of impending death, due to some existing infirmity, illness, or peril*. It is plain that the rule as just stated is not limited to death-bed gifts. Death may be postponed for weeks or months, but the donor must apprehend his death as *impending*, and the condition or circumstance which is likely to cause his death must be an *existing* one.

An instruction embodying the foregoing statement accords with the established meaning of the term "in contemplation of death"; it fixes a standard of general application; and it describes with certainty the circumstances under which a gift may be held taxable. A refusal to accept it is a departure from the long established legal meaning of the term and produces the uncertainty apparent in the instruction given by the trial court.

It is appropriate here to note that although infirmity or illness in the grantor is a necessary element in a gift in contemplation of death, there is no infirmity whatever in the gift itself. Such a gift may vest title, possession and enjoyment irrevocably in the donee immediately upon delivery "entirely regardless of the motives of the grantor for the conveyance" (*Hunt v. Wicht*, 174 Cal. 205, 210). "The death of the transferor adds nothing to the transfer if full rights have passed to the grantee prior to that time". (*Chambers v. Lamb*, 199 Pac. 33, 34 c. 2. Sup. Ct. Cal. 1921). The foregoing

is true in those states, including California, where the tax *attaches* at the time of the transfer but becomes *payable* upon the death of the transferor, as well as in New York where the tax both *attaches* and becomes *payable* at the time of the transfer (*Matter of Hodges*, 215 N. Y. 447, 109 N. E. 559; *Chambers v. Lamb*, 199 Pac. 33, 34, c. 2, Sup. Ct. Cal. 1921; *Estate of Miller*, 184 Cal. 674, 684, 195 Pac. 417, c. 2, top). Also, the state has no interest in property given *inter vivos* in contemplation of death, but merely has a lien upon the property for the tax in force when the transfer is made (*Estate of Potter*, 63 Cal. Dec. 141, 143, Sup. Ct. Cal. 1922).

It is therefore clearly erroneous to say that an absolute gift, though made in contemplation of death, is testamentary in its nature, for as a conveyance, its characteristics are totally different from those of a will.

“The essential characteristic of an instrument testamentary in its nature is, that it operates only upon and by reason of the death of the maker. Up to that time it is ambulatory. . . .

“A man may desire to make disposition of his property in his lifetime to avoid administration of his estate after death. Indeed, in view of the fact, both patent and painful, that the fiercest and most expensive litigation, engendering the bitterest feelings, springs up over wills, such a desire is not unnatural. And when it is given legal expression, as by gifts absolute during life, or by gifts in trust during life, or voluntary settlements, there is manifest, not only an absence of testamentary intent, but an absolute hostility to such intent.”

Nichols v. Emery, 109 Cal. 323, 329 foot, 331 foot.

"When an instrument is testamentary it is ambulatory, like a will. A will is ambulatory for the reason that it does not take effect until the death of the testator, and may be changed by the testator any time before death. . . . With deeds that have been delivered it is different. A deed signed, sealed, and delivered becomes at once binding and effective, and from thenceforth it is irrevocable and unchangeable. . . . In order that a writing in form a deed may be held to be testamentary, it must lack delivery. If the instrument in form a deed is delivered it at once becomes binding and effective, and cannot thereafter be revoked or changed. Such an instrument is not testamentary in character. . . . A deed that has been delivered is valid even though the estate is a future estate."

Heiligenstein v. Schlotterbeck, 133 N. E. 188, 190, c. 2 (Ill. 1921).

See also,

Bowdoin College v. Merritt, 75 Fed. 480, 483-4 (C. Ct. Cal., Hawley, C. J., 1893).

There are some early cases in which "intent to evade" taxation is mentioned as a factor to be considered in determining whether a transfer was made in contemplation of death. But this introduces a foreign quantity. The only question presented is whether a given transfer falls within the statute or not. (We refer, of course, to a genuine conveyance, and not a colorable transaction.) If it falls within the statute, it is unnecessary to establish an intent to "evade", and if it does not fall within the statute, an intent to "evade" is immaterial.

"When the law draws a line, a case is on one side of it or the other, and if on the safe side is

none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as an evasion, what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law."^{5a}

Bullen v. Wisconsin, 240 U. S. 625, 630.

The desire to prevent evasion of death duties may prompt a legislature to tax certain transfers, but when the legislative policy is effectuated by a statute which describes the transfers to be taxed, the evasion question is superseded by the statute designed to prevent evasion, and the only matter to be determined is whether or not a particular transfer was made under circumstances which bring it within the class made taxable by the statute.

It is possible, of course, that proof of an intent to "evade" may bear upon the issue as to whether or

(5a) "The right to change the status of an organization or to dissolve an organization in any legal manner, is not made ineffectual because the motive impelling the change is to reduce or avoid taxation in the future. The right so to do is an incidental right, inseparably connected with an individual's right to own and control his property. It is practically identical with the sale by a citizen of tax-burdened securities and the investment of the proceeds thereof in tax-exempt ones, for the purpose of reducing or avoiding taxation. . . . It is altogether different from tax dodging, the hiding of taxable property, or the doing of some unlawful or illegal thing in order to avoid taxation." *Weeks v. Sibley*, 269 Fed. 155, 158 (D. Ct. Texas, 1920).

"It is well settled that a man may change his habitation or domicile from one town to another, merely because he wishes to diminish the amount of his taxes. If he really intends to change his residence, and does change it, the motive which prompts him to do so is not material."

Draper v. Hatfield, 124 Mass. 53, 56. ¹

not a transfer had been made under taxable circumstances, but the presence or absence of such an intent is not the standard by which taxability or nontaxability is to be determined.

2. At the time of their introduction into transfer tax legislation, the terms (a) "to take effect in possession or enjoyment at or after the grantor's death", and (b) "in contemplation of death" were terms of definite legal meaning.

The two general classes of transfers *inter vivos*, now almost universally included in transfer tax laws, are the two named in the foregoing caption. The taxation of class (a) was first introduced in the Pennsylvania inheritance tax act of 1826 (Laws of Pennsylvania, 1825-1826, chap. LXXII, pp. 227-228; *Reish v. Commonwealth*, 106 Pa. State 521 [1884]), and class (b) was taxed for the first time under the New York transfer tax law as amended in 1891 (Laws of New York, 1891, page 409, chap. 215). A brief summary of the origin of the terms describing the two classes shows them to have had the definite significance of which we have spoken, when they were first introduced into transfer tax legislation.

- (a) Transfers intended to take effect in possession or enjoyment at or after the grantor's death.

The term "take effect in possession or enjoyment" was taken from the definition of a remainder. In 2 *Fearne on Remainders*, § 160 (4th Am. Ed. 1845), a remainder is described "as limited to take effect, in

possession, or in enjoyment, or in both, after the regular expiration of another estate".

In 2 *Washburn on Real Property*, 4th ed., 1876, it is said:

"A remainder may be defined to be an estate or interest in land or tenements to take effect in possession or enjoyment immediately upon the determination of a prior estate" (p. 539);

also, that it is appropriate to apply "the term *possession* to corporeal, and that of *enjoyment* to incorporeal, hereditaments" (p. 536). Again, it may be said that "possession" is the appropriate word to use in connection with legal remainders, and that "enjoyment" is properly used when speaking of equitable interests.

It is clear that the term "to take effect at or after the grantor's death" was intended to deal with transfers by which there is a present vesting in interest, but a postponed possession or enjoyment. Obviously, it was not intended to deal with transfers which do not pass title during the life of the grantor. They were already taken care of by the clause taxing transfers occurring at death.

(b) Transfers made in contemplation of death.

The New York law of 1891 was passed twenty-six years after the whole law of gifts had been codified in "The Civil Code of the State of New York" (prepared for adoption in 1865 by David Dudley Field and Alexander W. Bradford, but never adopted), familiarly known as the Field Code.

In January, 1873, the Civil Code of California came into effect, and copied verbatim the sections of the Field

Code pertaining to gifts (sections 1146-1153, C. C. Cal.), as follows:

§1146. *Gifts defined.* A gift is a transfer of personal property, made voluntarily and without consideration.

§1147. *Gift, how made.* A verbal gift is not valid, unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee.

§1148. *Gift not revocable.* A gift, other than a gift in view of death, cannot be revoked by the giver.

§1149. *Gift in view of death, what.* A gift in view of death is one which is made in contemplation, fear, or peril of death, and with intent that it shall take effect only in case of the death of the giver.

§1150. *When gift presumed to be in view of death.* A gift made during the last illness of the giver, or under circumstances which would naturally impress him with an expectation of speedy death, is presumed to be a gift in view of death.

§1151. *Revocation of gift in view of death.* A gift in view of death may be revoked by the giver at any time, and is revoked by his recovery from the illness, or escape from the peril, under the presence of which it was made, or by the occurrence of any event which would operate as a revocation of a will made at the same time.

§1152. *Effect of will upon gift.* A gift in view of death is not affected by a previous will; nor by a subsequent will, unless it expresses an intention to revoke the gift.

§1153. *When treated as a legacy.* A gift in view of death must be treated as a legacy, so far as relates only to the creditors of the giver.

See, also,

§1367. *Satisfaction.* A legacy, or a gift in contemplation, fear, or peril of death, may be satisfied before death.

Later, these sections of the Civil Code of California were copied by North Dakota, South Dakota and Montana.

In *O'Neil v. O'Neil*, 43 Mont. 505, 117 Pac. 889 (1911) involving a gift *causa mortis*, it was decided that the Montana statute upon this subject was "in conformity with the common law." Thus the common law on the subject has been codified in the Field, California, North Dakota, South Dakota and Montana codes.

From this codification it plainly appears that the term "in contemplation of death" had a fixed significance when, in 1891 and 1893 it was incorporated into the inheritance tax laws of New York and California respectively.

(c) Gifts causa mortis.

It is apparent from what we have said of transfers "to take effect in possession or enjoyment at or after the grantor's death", that the term cannot cover a gift *causa mortis*, whether the ruling in *Basket v. Hassell*, 107 U. S. 602, is followed, where it was held that title, interest, possession and enjoyment pass immediately to the donee of a gift *causa mortis*,⁶ or whether we

(6) The California decisions are to the same effect: *Stout v. McNab*, 157 Cal. 356, 360; *Beebe v. Coffin*, 153 Cal. 174, 176-177; *Pullen v. Placer County Bank*, 138 Cal. 169, 170; *Hart v. Ketchum*, 121 Cal. 426, 429; *Daniel v. Smith*, 64 Cal. 346, 349; *Fite v. Perry*, 8 Cal. App. 85; *Church's Probate Law and Practice*, 1st ed., Vol. II, p. 1607.

accept the doctrine of *Williams v. Guile*, 117 N. Y. 343, 22 N. E. 1071 (1889), that the gift "is ambulatory, incomplete and revocable during the donor's lifetime" and "leaves the whole title in the donor, unless the event occurs which is to divest him", supported as it is by Judge Story quoted in the case, and also by Chief Justice Shaw in *Parish v. Stone*, 14 Pick. 198, 203 (1833).

It is obvious that if a gift *causa mortis* has the elements stated in *Basket v. Hassell*, it is a present transfer without any postponement of possession or enjoyment, and on the other hand, if the gift is not to be deemed effective until the death of the donor, then it is not a transfer in life at all.

Therefore, if gifts *causa mortis* were taxable at all prior to the New York law of 1891, which was the first to tax gifts in contemplation of death, they could only have been taxable under an extremely latitudinarian construction of the provision taxing the passing of property by will, put upon the ground that a gift *causa mortis* has some of the attributes of a legacy.

Mention of this point is pertinent here, for when the question of what constitutes a transfer in contemplation of death first came before the New York courts, the argument was made, as we have seen, that such transfers covered gifts *causa mortis* only. But the taxing authorities argued in reply, among other things, that the provision taxing transfers "in contemplation of death" was not intended to be limited to gifts *causa mortis*, inasmuch as these gifts were already taxable under the clause in the original statute which taxed transfers to take effect in possession or enjoyment at death. It had

been so declared in two cases⁷ and the point is mentioned in *Matter of Price*, 62 Misc. 149, 116 N. Y. S. 283.

We submit, however, that the true rule is as we have stated it, and that even if we assume that gifts *causa mortis* might have been taxable under a latitudinarian construction of the provision taxing the passing of property by will, it was highly appropriate that a provision should be introduced which in terms covered the case.

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3. It has never been disputed that gifts *causa mortis* are transfers in contemplation of death; but it is not true that all transfers in contemplation of death are gifts *causa mortis*. Several early New York cases held, however, that transfers in contemplation of death were confined to gifts *causa mortis*, but this view was rejected in the later New York decisions.

The outstanding features of a gift *causa mortis* are (a) imminence of death and (b) revocability. A gift *causa mortis* is revocable at any time during the life of the donor, and is automatically revoked by his recovery.

Gifts made when death is imminent may be intended, however, as irrevocable gifts; and if it were held that gifts in contemplation of death meant only gifts *causa mortis*, all irrevocable gifts would be nontaxable, even though made when death was imminent. It is not difficult, therefore, to understand why courts have refused

(7) *Matter of Crosby*, 20 N. Y. S. 62 (Spring, Surr., 1891); and *Matter of Edwards*, 85 Hun. 436, 32 N. Y. S. 901 (1895).

to limit transfers in contemplation of death to gifts *causa mortis*.

There are, however, some early cases in New York in which it was either decided or stated that transfers in contemplation of death are limited to gifts *causa mortis*.

Matter of Seaman, 147 N. Y. 69, 41 N. E. 401 (1895);

Matter of Spaulding, 22 Misc. Rep. 420, 50 N. Y. S. 398 (1898), 49 App. Div. 541, 63 N. Y. S. 694 (1900), aff'd 163 N. Y. 607, 57 N. E. 1124 (1900);

Matter of Edgerton, 35 App. Div. 125, 54 N. Y. S. 700 (1898), aff'd 158 N. Y. 671, 52 N. E. 1124;

Matter of Bullard, 76 App. Div. 207, 78 N. Y. S. 491 (1902), aff'g. 37 Misc. Rep. 663, 76 N. Y. S. 309 (1902);

Matter of Graves, 52 Misc. Rep. 433, 103 N. Y. S. 571 (1907).

Matter of Seaman, the first of the cases mentioned, actually decides that transfers in contemplation of death are limited to gifts *causa mortis*. Furthermore the decision (in line with *Williams v. Guile*, 117 N. Y. 343, 22 N. E. 1071) rests upon the doctrine that in gifts *causa mortis* the transfer of interest, possession and enjoyment occurs, not when the gift is made, but at the death of the donor.

Matter of Seaman was not a case involving the taxability of a transfer in contemplation of death. Vested remainders had been created by the will of a testator who died in 1876, before the first transfer tax law of New York had been passed. The remaindermen how-

ever did not come into possession or enjoyment until 1893, and in the meantime the New York law of May 1, 1892, had been enacted. It was claimed that the coming into possession by the remaindermen was taxable under the act of 1892.

The Court of Appeals was called upon [a] to give the act of 1892 an interpretation which would limit its operation to future transfers only, or [b] to hold that it laid a tax upon a future event which might have originated in a transfer antedating the passage of the act; and [c] if the latter construction were adopted, then to decide the constitutionality of the act.

The court decided that the act could be interpreted as levying a tax on future transfers only; and it did so interpret the act by limiting its operation to transfers in contemplation of death, and, furthermore, by holding that transfers in contemplation of death were limited to gifts *causa mortis*, whereby a grantor

“conveyed and delivered his deed before 1892 [when the statute under review was passed] in contemplation of death, and to take effect [as a transfer of title] upon the happening of that event, or reserving a power of revocation, as well as the possession or enjoyment, during his lifetime [which we hold to be the equivalent of a transfer first occurring at death].”⁸

(8) *Bullen v. Wisconsin*, 240 U. S. 625. In this connection, it is to be observed that the reservation of a power of revocation does not in and of itself require a ruling that the transfer first occurs at death. *Matter of Bowers*, 231 N. Y. 105, 132 N. E. 910; *People v. Northern Tr. Co.*, 289 Ill. 475, 124 N. E. 662; *Tennant v. Tennant*, 167 Cal. 570, 140 Pac. 242. But if the donor reserves a life interest as well as a power of revocation, it has been held that there is no transfer until death. *Bullen v. Wisconsin*, *supra*; *Matter of Dana*, 215 N. Y. 461, 109 N. E. 557.

We purpose later to consider the decisions of New York, which hold that transfers in contemplation of death are not confined to gifts *causa mortis*. Before doing so, however, we shall refer to the Illinois cases. They have defined and applied the term "in contemplation of death" in accord with the present accepted meaning of the words, and they have influenced the later New York cases which are now in harmony with the present prevailing definition of the term.

4. The Illinois cases dealing with transfers "in contemplation of death" have defined the term correctly, and have been followed in the later New York cases.

The first Illinois transfer tax act was passed in 1895 (Laws of Illinois, 1895, p. 301). Like the California law, it was modeled after the New York acts of 1885 and 1887, as amended in 1891.

In the first contemplation of death case which came before the Supreme Court of Illinois, the court held that transfers "in contemplation of death" should not be limited to gifts *causa mortis*, but that they properly included absolute gifts *inter vivos* made when the donor's death was impending. This ruling has been consistently followed in all the contemplation of death cases which have arisen in Illinois; it has been followed in New York and California; and it has been generally quoted and adopted throughout the country.

The case referred to is *Rosenthal v. People*, 211 Ill. 306, 71 N. E. 1121 (1904), and because of its importance and the generally accepted accuracy of the views stated

in it and later Illinois cases, we quote from it at length and also from a recent Illinois decision. We believe that these cases contain true statements of the present law governing the taxation of gifts in contemplation of death.

In *Rosenthal v. People* the court said:

“The argument for appellant is largely devoted to the question whether the gift was a gift *inter vivos* or a gift *causa mortis*, and counsel contend that it was an absolute gift *inter vivos*, and that there was no evidence of an intent to defraud the state of the inheritance tax, and that for these reasons it was not subject to the tax. They rely upon decisions in New York, where the courts, in construing a similar statute, appear to have considered it important to determine whether the gift was *inter vivos* or *causa mortis*, and have held that if it was *causa mortis* the property would be subject to the tax, but if it was *inter vivos* the property transferred would not be taxable, unless made by the donor and received by the donee for the purpose and with the intention of evading the inheritance tax and defrauding the state. There is no presumption that a person intends to commit a fraud, and under these decisions it must be proved that a gift *inter vivos* was made in contemplation of impending death, and was made and received for the purpose of defrauding the state. We do not regard it as necessary to classify gifts in that way in order to interpret or give effect to the language of our statute. While the statute was doubtless not intended to impose limitations on the right of a person to give away his property whenever he might see fit, the intention clearly was to tax property passing by will or the intestate laws of the state, or by such gifts or transfers as are of like nature and can properly be classed therewith. Gifts *causa mortis* would be within the statute; that is, a gift by one who an-

icipates death as being near, made in view of his death, and to take effect by that event. *Telford v. Patton*, 144 Ill. 611, 33 N. E. 1119. The donor has a right to recover back the gift in case he survives, and it is of the nature of a legacy and subject to the debts of the deceased donor. The statute, however, embraces all gifts made in contemplation of death, and that language does not naturally or necessarily involve a fraudulent intent. Similar language is used respecting business transactions, such as settlements in contemplation of marriage; or a fraudulent intent may be involved, as in transfers in contemplation of insolvency or bankruptcy. A gift is made in contemplation of an event when it is made in expectation of that event and having it in view; and a gift made *when the donor is looking forward to his death as impending*, and in view of that event, is within the language of the statute. With that understanding of the law, there is no doubt that the gift in this case was made in contemplation of death." (211 Ill. 308-309, 71 N. E. 1122.)

The second Illinois contemplation of death case which we have referred to is *People v. Danks*, 289 Ill. 542, 124 N. E. 625 (1919). After reviewing the earlier Illinois cases on the subject, the court summarized the law governing the taxability of transfers in contemplation of death as follows:

"The purpose of the provisions imposing a tax upon gifts and transfers intended to take effect in possession or enjoyment after the death of the donor, or made in contemplation of his death, was to prevent an evasion of such laws by a distribution of property just before or in anticipation of the owner's death. Its manifested purpose was to include all gifts or transfers made prior to the donor's death which were similar in their nature and effect to a testamentary disposition of prop-

erty or accomplished the same object, under circumstances which imparted to it the characteristics of a devolution of property made in anticipation of the donor's death. *Rosenthal v. People*, 211 Ill. 306, 71 N. E. 1121. A gift is made 'in contemplation of death' when it is made in expectation of that event, or with that event in view. *Rosenthal v. People*, *supra*. The term does not mean that general expectation which all rational persons have that they must die some time, but refers more particularly to *that apprehension of death which arises from some existing infirmity of such a character as would prompt an ordinarily prudent person to make a disposition of his property* and bestow it upon those whom he regarded as most entitled to be the recipients of his bounty. *People v. Carpenter*, 264 Ill. 400, 106 N. E. 302. What prompts the making of such a conveyance rests upon the facts and circumstances surrounding each particular case. No general rule can be formulated which will fit all cases, but each case must be examined and determined on its own facts and circumstances, in the light of the experience which the courts have gained in dealing with such matters. For this purpose the donor's age, *physical condition*, and *any action contemplated to be taken by him with respect to his health*, as well as *the length of time he survives the making of the transfers*, are all proper matters to be considered in determining whether or not the act was done in contemplation of death. If, upon a consideration of all the surrounding facts and circumstances, it is apparent *the donor's condition was such that he might reasonably have expected death at any time*, and the disposition made of his property is such as he had contemplated making in that event, or such as he might reasonably be supposed to have desired to be made at his death, and no other moving cause is apparent for making the transfer at the time it was made, the gift will be deemed to have been made in contemplation of death, even though the transfer is absolute in form and such

as would invest the donee with the absolute right to the property during the lifetime of the donor." (289 Ill. 547-8, 124 N. E. 627.)

Rosenthal v. People, the first of the Illinois cases from which we quoted, *supra*, was followed in New York in *Matter of Price*, 62 Misc. Rep. 149, 116 N. Y. S. 283 (1909). Before quoting from the opinion in this case, however, we may cite an earlier New York case, in which an absolute gift *inter vivos*, made by an aged consumptive eight days before her death, was held taxable. (*Matter of Birdsall*, 22 Misc. Rep. 180, 49 N. Y. S. 450 [1899].) As we have seen, there were some early New York cases in which the *causa mortis* test was approved, but in *Matter of Price* (preceded by *Matter of Palmer*, 117 App. Div. 360, 102 N. Y. S. 236 [1907]) the Birdsall ruling and the Illinois decisions were adopted and since then the New York cases have been in line with them.

Matter of Price reviews the New York cases and states clearly the test of taxability which is now uniformly followed. After discussing the restricted meaning given the term in some of the early cases, the court said:

"A restricted signification of the scope of the . . . statutes . . . is scarcely in accordance with the deductions which may be drawn from the application of well-recognized rules of statutory construction. . . . In determining whether the gift was made in contemplation of death, the courts should not be restricted to those cases where the circumstances (such as that the gift was made when the donor was in extremis, or was dangerously ill, or in danger of immediate death, or afflicted with an acute disease) would indicate the

existence of those conditions necessarily requisite to the validity of a gift *causa mortis* but rather that the facts and circumstances surrounding the making of the gift be taken into consideration and a determination arrived at as to *whether such facts and circumstances indicate that the gift was made while the donor contemplated the probability of his own death in the immediate future, or whether or not the imminence of the donor's death was in any substantial sense a direct cause of such gift.* *Matter of Palmer*, 117 App. Div. 360, 102 N. Y. Supp. 236; *Rosenthal v. People*, 211 Ill. 309, 71 N. E. 1121." (62 Misc. Rep. 151-2, 116 N. Y. S. 284.)"

The foregoing quotations from *Matter of Price* and the two Illinois cases are in harmony with the California decisions dealing with transfers in contemplation of death, made before the adoption of the statutory definition in 1911. In the succeeding point we review the California cases. Before doing so however we quote from *Matter of Crary*, 31 Misc. Rep. 72, 64 N. Y. S. 566 (mentioned in the opinion below), to show that the views expressed therein are in no way at variance with those contained in the foregoing quotations:

"The appraiser found, as a matter of fact, that the transfers in question were not made in contemplation of death, within the meaning and intent of the statute. It is conceded that the gifts were *inter vivos*, and not *causa mortis*. The question presented to the appraiser was purely one of fact, and while, from its peculiar nature, it is hedged about with difficulties, it is none the less a question of fact, and as such falls within the well-settled rules of findings of fact by a trial court. The statute was evidently intended to reach absolute transfers of property when made under a certain condition, viz., when the transferor was contemplating death; that is, the thought of death has taken

so firm a hold on his mind as to control and dictate his actions regarding his property, and the business is transacted while contemplating death, and considering what conditions would arise or exist in the event of death without making the transfer, or, to be more specific, the contemplation of death is the sole motive and cause of the transfer. The transferror, realizing and contemplating that he is to die, wishing certain of his property to pass in a different manner than it would under the statute or by the terms of a will theretofore made, makes the transfer 'in contemplation of death,' and such transfer is taxable, whether made one day or one year prior to death; but, if made with other motives and for other causes, it is not taxable, no matter when made, as it cannot be presumed that the legislature intended to place any limitation upon the inherent right of a person to give away his property whenever and to whomsoever he desires. The peculiar operation of a particular person's mind at a particular time, and while transacting a particular kind of business, is something which is not susceptible of direct proof, nor is it within the realm of expert analysis; and if the application of this statute is surrounded by grave difficulties, dependent to a certain extent upon the psychological speculations of the appraiser who is prosecuting the investigation, remedy lies with the legislature, and not with the courts.

Many reasons will recur to the mind why even an old man, in poor health, possessed of a large property, might make transfers which would not necessarily be made 'in contemplation of death', within the purview of the statute."

Inasmuch as *Matter of Dee*, 148 N. Y. S. 423 (Surr. Ct. 1913) [aff'd. without opinion, 161 App. Div. 881, 145 N. Y. S. 1120 (1914), aff'd. without opinion 210 N. Y. 625, 104 N. E. 1128 (1914)] is referred to in the opinion below, we here set out for convenient reference, the

facts in that case as stated in the surrogate's opinion. Decedent was found dead about two o'clock in the morning of March 18, 1912, upon the stairs leading to his room. The gift was made on the preceding day. Said the court:

"Two facts, appearing without denial or qualifications, require the finding that in this case the transfer was 'in contemplation of death' and is taxable. The donor was a physician living in the household of the donee. Prior to the gift, in speaking of the donee and her husband to the one witness whose statement is submitted, the decedent said that:

'The only relations he had was the people in the house and that is the only people he had and the people that took care of him, . . . and if anything should happen to him that he would see that they would be well taken care of for the rest of their days, because they had treated him just the same as a mother or father.'

The decedent, having delivered the gift at about 10:30 in the evening, was observed at 12 o'clock of the same night by this witness, who says:

'When I came down in his office he had them things the doctor has to test his chest, testing his chest, and when he saw me he dropped them, and I asked him was he ill, and he said no.'

Except for this statement, the decedent was apparently in his ordinary health when the gift was made. At about 2 o'clock the following morning he was found upon the stairs of his dwelling, dead. The cause of his death is not shown." (148 N. Y. S. 424.)

5. In California, where a statutory definition was adopted in 1911, transfers made before that time are governed by the "generally accepted" meaning of the words "in contemplation of death", and transfers made after the enactment are governed by the broader terms of the legislative definition.

Seven contemplation of death cases have arisen in California. In five of them the transfers involved were made before July 1, 1911, when the legislature added its definition to the statute; in the sixth (*Estate of Minor*, 180 Cal. 291) one transfer was made before the definition was passed, and one afterward, although both were referable to an earlier transaction; and in the seventh (*Estate of Pauson*, 199 Pac. 331) the transfer was made in 1915 and was therefore governed entirely by the broader terms of the statutory definition.

Estate of Minor, 180 Cal. 291, speaks of California as having two definitions of the terms, the "generally accepted" one and "the statutory definition of the phrase". We shall review the California cases to show that in the case of transfers which were made before the term was defined by statute, the California decisions accept and apply the "generally accepted" definition which we have earlier described as prevailing in all the states in which a legislative definition has not been enacted.

In three of the seven California cases the trial court found that the gift was made in contemplation of death and the finding was affirmed on appeal; in three, the trial court found that the gift was not made in contemplation of death and was affirmed; and in one (*Estate of Minor*) the trial court found that the gift

was made in contemplation of death, but the finding was reversed on appeal. Two of the three cases in which the transfer was held to have been made in contemplation of death involved transfers made before the adoption of the statutory definition, and we shall review them first.

In *Estate of Reynolds*, 169 Cal. 600, 147 Pac. 268 (1915), the facts were stated by the court as follows:

“The cause of his death was sarcoma—a malignant tumorous growth which first made its appearance upon one of his hips. The excision of a sarcoma by surgical operation sometimes results in an eradication of the trouble. At other times it is recurrent. In the case of Mr. Reynolds the first surgical operation became necessary in 1904. Thereafter the tumor returned and he was obliged to submit to an operation about once a year. In the later stages of the affliction more frequent operations became necessary, the last three occurring three months apart. Mr. Reynolds was well advised of the character of sarcoma; knew from experience the danger of its recurrence, and that if not successfully eradicated it meant death. On the third day of September, 1910, about one year before his death, it was deemed necessary to perform one last grave operation. That was the amputation of his right leg at the hip. This operation held out the only hope of checking his mortal disease. Two days before the operation was performed [he made the first transfer to his wife] . . . He recovered from the effects of the operation, but in the spring of 1911 began to fail. The sarcoma returned and, as has been said, occasioned his death in September [21, 1911]. On April 14, 1911, he made [the second transfer] . . . to his wife. One day thereafter he made his will. . . . It was about six months after the last operation [which occurred September 3, 1910] when Mr. Reynolds began to fail. He was

confined to his home from June until his death. On May 26th [1911, he made the transfer to his son] . . .”

In *Abstract & Title Guaranty Co. v. State*, 173 Cal. 691, 161 Pac. 264 (1916), a tax was likewise imposed on the transfer as one made in contemplation of death.

Decedent died January 19, 1909. The transfer was made July 10, 1908, to a family corporation, the stock of which was wholly owned in equal shares by the three sons and only heirs of the donor. It appeared that

“At the time of the conveyance to the family corporation Gorges Hely [the donor] was eighty years old; that this physical condition was such that, if a reasonable man, he must have apprehended that death was likely to occur at any time; that without any material change or improvement in his physical condition death did occur a little more than six months after the execution of the deed. . . It was shown by the statements of the physicians who attended him at about the time when the deed was executed that Gorges Hely, who was eighty years of age, was very feeble. He was a sufferer from Bright’s disease, and his circulatory organs were in a state of arterial sclerosis, resulting in a functional derangement of all the organs. He was unable to care for himself. A nurse, who attended him during the last six and a half months of his life, said that he only uttered the words ‘Yes’ and ‘No’ during that period, and was not able to hold an intelligent conversation. There was some evidence of his ability to read books at about this time, but there was abundant testimony of his great physical feebleness.” (173 Cal. 693, 695-6.)

The foregoing two decisions are the only California contemplation of death cases sustaining a tax on a trans-

fer made before the legislative definition was adopted. We turn now to the cases in which the transfer was held nontaxable.

In *Spreckels v. State*, 30 Cal. App. 363, 158 Pac. 549 (rehearing denied by Supreme Court), the court held the gift in 1910 nontaxable and in the course of its opinion defined the phrase "in contemplation of death" in accordance with the prevailing rule:

"A reasonable and just view of the law in question is that it is only where the transfer of property by gift is immediately and directly prompted by the expectation of death, that the property so transferred becomes amenable to the burden. Or, as counsel for the respondents with singular aptness states the proposition: 'It is only when contemplation of death is the motive without which the conveyance would not be made, that a transfer may be subjected to the tax.' That is, the expectation of death must be the direct, specific, and immediate animating cause of the transfer. Or, as the proposition is perhaps the more lucidly explained as follows in Ross on Inheritance Taxation, section 117, referring to the words, 'in contemplation of death', as they are used in statutes authorizing the subjection of property transferred by gift to the burdens of an inheritance tax, 'They are intended to cover transfers of persons who are prompted to act by reason of the expectation of death and who thereby accomplish transmissions of property in the nature of testamentary dispositions. The words do not refer to that general expectation commonly entertained by all persons, but rather to that apprehension which arises from some existing condition of body or some impending peril'. . . .

The views thus expressed upon the meaning of the words referred to are in harmony with those to be found in all the cases. (See *State v. Pabst*, 139 Wis. 561, [121 N. W. 351]; *Rosenthal v. People*,

211 Ill. 309, [71 N. E. 1122]; *People v. Burkhalter*, 247 Ill. 600, [139 Am. St. Rep. 351, 93 N. E. 379]; *In re Dessert's Estate*, 154 Wis. 320, [Ann. Cas. 1915B 1084, 46 L. R. A. (N. S.) 790, 142 N. W. 647].)"

The views expressed in the foregoing quotation were applied in *McDougald v. Wulzen*, 34 Cal. App. 21, 166 Pac. 1033, where the finding of the trial court that the gift in 1909 had not been made in contemplation of death was affirmed on appeal; in *Kelly v. Woolsey*, 177 Cal. 325, 170 Pac. 837, where the taxing authorities abandoned on appeal the claim that the transfers in 1906 had been made in contemplation of death; and in *Estate of Minor*, 180 Cal. 291, 180 Pac. 813, where the Supreme Court reversed the finding of the trial court that the transfers in 1908 and 1912 had been made in contemplation of death on the ground that they did not come within either the commonly accepted definition or the statutory one.

The latest contemplation of death case in California, *Estate of Pauson*, 199 Pac. 331, turns, as we have seen, not upon the prevailing definition of the term, but upon the broader statutory definition of 1911. It is therefore pertinent here only for its ruling that before the California definition was adopted transfers were governed by the prevailing definition, and the one which we here contend should be applied to the Estate Tax Act of 1916, which contains no definition.

The federal act, it is true, establishes a statutory presumption that a gift shall be deemed, *unless shown to the contrary*, to have been made in contemplation

of death when (a) the transfer is of a material part of the donor's property and in the nature of a final distribution, (b) when it is without consideration, and (c) when it occurs within two years of the donor's death. But the elements which raise a rebuttable presumption do not in any sense constitute a definition. They merely set the statute in motion.

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6. The definition of the term, as stated and applied in California before the legislative definition was enacted, has been adopted in Kentucky, and was applied in Wisconsin, before the statute in the latter state was altered by a provision establishing a conclusive presumption.

In *Commonwealth v. Fenley*, 189 Ky. 480, 225 S. W. 154 (1920), the court said:

"The anticipation or apprehension of death in the ordinary and natural course of events is not such contemplation of death as the statute has in view. The contemplation of death the statute speaks of is a present apprehension of death arising from some existing condition or impending peril that would reasonably create a fear that death was near at hand, as, for example, when the grantor is in bad health and the compelling thought of death is prominent in his mind, or when he is in the presence of or there is fear or apprehension of some danger or peril that might reasonably and naturally produce an expectation of death. . . .

"The imposition of the tax upon transfers and gifts during the life of the grantor was only designed to prevent the primary purpose of the statute from being defeated or evaded by gifts or transfers that might be made when death was reasonably believed to be impending, and therefore

we think that when the Commonwealth seeks to tax under this statute property transferred by deed, grant, sale or gift, it is incumbent upon it to show that the person making the deed, transfer, grant, or gift, was, by reason of the *condition of his health* or the presence of some *threatening danger or peril*, seeking to dispose of his estate before death came."

"In 26 R. C. L., p. 225, the prevailing rule in the construction of statutes reading like ours is thus stated: 'It has sometimes been held that such statutes apply only to gifts *causa mortis*, and to gifts made for the purpose of evading the inheritance tax. But the sounder view is that the statutes apply to gifts *inter vivos* as well as *causa mortis*, provided they are made "in contemplation of death", that is, an apprehension of death arising from some existing bodily condition or impending peril and not the general expectation of eventual decease commonly entertained by all persons. The contemplation of death must be the impelling motive without which the conveyance would not be made in order to subject the transfer of property to the inheritance tax.' " (189 Ky. 482-4, 225 S. W. 155-6.)

In *State v. Thompson (Estate of Dessert)*, 154 Wis. 320, 142 N. W. 647 (1913), the court said:

"An act is not done in contemplation of death when the feeling that dissolution is approaching is absent and is not the cause which impels or prompts the doing of the act. . . .

It was held in *State v. Pabst*, 139 Wis. 561, 121 N. W. 351, that the words 'in contemplation of death', as used in the statute quoted were, 'not used as referring to that expectation of death generally entertained by every person'. Speaking affirmatively, the opinion proceeds: 'The words are evidently intended to refer to an expectation of death *which arises from such a bodily or mental condition as prompts persons to dispose of their property* and bestow it on those whom they regard

as entitled to their bounty.' In further explanation of the phrase it is said: 'A gift is made in contemplation of an event when it is made in expectation of that event and having it in view, and a gift made when the donor is looking forward to his death *as impending, and in view of that event*, is within the language of the statute.' In that case the circuit court held that the gifts made by Capt. Pabst were subject to the inheritance tax principally because he was suffering from a serious if not a necessarily fatal disease at the time the gifts were made, which ultimately produced death; and this court affirmed the judgment. The definition of the words 'in contemplation of death' given in the Pabst case does not differ from that announced by the New York court in *re Baker's Estate*, 83 App. Div. 530, 82 N. Y. Supp. 390; affirmed 178 N. Y. 575, 70 N. E. 1094, where it is said: 'This court has held that the words "in contemplation of death" do not refer to that general expectation which every mortal entertains, but rather the apprehension which arises from some existing condition of body or some impending peril.' Neither does it differ from the interpretation put upon the words by the Illinois court in *People v. Burkhalter*, 247 Ill. 600, 604, 93 N. E. 379, 139 Am. St. Rep. 351, where it held that contemplation of death must be the impelling motive for making the gift in order that it be subject to an inheritance tax.' (142 N. W. 649-50.)

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7. **A transfer cannot be held to have been made in contemplation of death merely because a grantor is of advanced years when the gift is made.**

In the table of mortality statistics issued in 1920 by the Bureau of the Census, covering deaths in this country for the year 1918, it appears that the number

of persons dying above the age of 75 years was as follows:

75 to 79 years	67,183
80 to 84 years	47,945
85 to 89 years	25,391
90 to 94 years	8,925
95 to 99 years	2,200

"Who's Who in America", 1920-1921, contains the following names, among others, of prominent Americans who have enjoyed long life. No suggestion of contemplation of death is apparent in their vigorous lives:

Charles W. Eliot (Harvard), 88, b. March 20, 1834 (p. 866).

Chauncey M. Depew, 87, b. April 23, 1834 (p. 757).

Ex-Speaker Joseph G. Cannon, 85, b. May 7, 1836 (p. 471).

Elihu Root, 77, b. February 15, 1845 (p. 2435).

Thomas A. Edison, 75, b. February 11, 1847 (p. 854).

Alexander Graham Bell, 75, b. March 3, 1847 (p. 219).

Lord Halsbury died on December 11, 1921, at the age of 98; and Lord Lindley predeceased him by two days, at the age of 94.

The following is taken from 55 Law Journal 332 (September 11, 1920):

"Lord Halsbury completed his ninety-seventh year on September 3. He thus easily leads the record of longevity held by Lord Chancellors. Lord St. Leonards died at the age of ninety-four, Lord Brougham at ninety, Lord Lyndhurst at ninety-one, Lord Eldon at eighty-seven, Lord Selborne at eighty-three, Lord Chelmsford at eighty-

two, and Lord Hatherley at eighty. In January last he celebrated the seventieth anniversary of his call to the bar.

The following are a few recent and conspicuous instances of persons, mostly Californians, who have attained more than ninety years:

Mrs. Isaac Requa of Oakland celebrated her ninetieth birthday June 22, 1920.

Charles Holbrook of San Francisco celebrated his ninetieth birthday September 1, 1920.

Cornelius Cole, at one time United States Senator from California, celebrated his 99th birthday at Los Angeles, September 17, 1921.

W. W. Montague of San Francisco, born October 5, 1827, died Sept. 28, 1920, age 92 yrs.

Charles W. Hendall died in Plumas County at the age of 97 years September 18, 1920 having been Supervisor of that county for the 10 years preceding his death.

Empress Eugenie died at Madrid, July 11, 1920, at the age of 94 years.

Levi P. Morton, former vice-president and ex-governor of New York, celebrated his 96th birthday May 15, 1920, and died two days thereafter.

Edward McLaughlin, banker, San Jose, died August 11, 1919, age 90 years.

Adolph Rosenthal died in San Francisco January, 1919, at 94 years of age.

James B. Haggin died in New York 1914, at the age of about 94.

R. H. Pratt of Corte Madera died May 3, 1920, age 95 years.

Two former Chief Justices of the State of California, John Currey and A. L. Rhodes, were over ninety years of age at the time of their deaths.

35 National Geographic Magazine, p. 507, issue of June, 1919, contained a photograph of the Centenarian

Club of Los Angeles, California, consisting of eighteen men and women over ninety years of age.

The New York Evening Post of July 3, 1920, contained a photograph of fourteen members of the Harvard Class of 1860 who attended the commencement exercises of 1920.

Numerous conspicuous examples of men whose mental and physical powers have continued unimpaired into the eighties and nineties are mentioned in the following quotations:

Longevity Among the Judiciary.

"The attainment by Lord Halsbury, on September 3, of his ninety-fourth birthday, in full possession of his mental and physical faculties, naturally recalls some instances of longevity in the cases of eminent members of the judiciary. Vice-Chancellor Bacon was born in 1798, died in 1895, and was on the Bench till 1886. The Right Hon. Thomas Lefroy, Lord Chief Justice of Ireland was born in 1776, discharged his judicial duties till he had entered on his ninety-first year in 1866, and lived until 1869. Lord Chancellor Plunkett lived until his eighty-ninth year. Lord St. Leonards was ninety-four, Lord Lyndhurst ninety-one, and Lord Brougham eighty-nine at the time of his death. Lord Campbell broke the record in being appointed Lord Chancellor for the first time in 1859, when past eighty; and in Ireland the Right Hon. Francis Blackburne, who had been successively Master of the Rolls, Lord Chief Justice of Ireland, Lord Chancellor, and Lord Justice of Appeal, was in 1886 reappointed to the Lord Chancellorship of Ireland in his eighty-sixth year." (61 Am. Law Rev., 936 [1917].)

Longevity in Other Callings.

“It is a mistake to suppose that a man who has reached the age of eighty years has reached the acme of his intellectual development. Pope Leo XIII and John Adams were in the full possession of their intellectual powers at ninety. John Wesley was at the height of his eloquence and at his best at eighty-eight. Michelangelo painted the greatest single picture that was ever painted since the world began at eighty. . . . George Bancroft was writing deathless history after eighty. Thomas Jefferson, Herbert Spencer, Talleyrand and Voltaire were giving out great ideas at eighty. Tennyson wrote his greatest poem, ‘Crossing the Bar,’ at eighty-three. Gladstone made his greatest campaign at eighty, and was the master of Great Britain at eighty-three. Humboldt, the naturalist, scientist—the greatest that Germany ever produced—issued his immortal ‘Kosmos’ at ninety. I saw Joe Jefferson play Rip Van Winkle at his best at seventy-five. Goethe wrote Faust—the last section—at eighty. The Irish actor Macklin was still on the stage at ninety-nine. Robert Browning was as subtle and mysterious as ever at seventy-seven, and Victor Hugo was at his best from 75 to 80.” (64 Cong. 1st Sess., Vol. 53, p. 7525.)

Longevity in Ireland.

“The death, in his ninety-fifth year, of Mr. John James Twigg, K. C., who was called to the Irish Bar in 1851, took silk in 1877, and became a Bencher of the Honourable Society of the King’s-inns, Dublin, in 1889, robs the Bar of Ireland—he had long retired from practice—of its oldest member, and of one of the most learned, honourable, and lovable personalities of that profession. Mr. Twigg’s great age recalls some conspicuous instances of longevity at the Irish Bar and on the Irish Bench. Mr. Robert Holmes, who died in 1859 in his ninety-second year,

was the Father of the Irish Bar, and for half a century, although he declined a silk gown and even the Solicitor-Generalship, was its acknowledged leader. Lord Plunket, who had been Chief Justice of the Irish Court of Common Pleas and subsequently Lord Chancellor, was, at his death in 1854, in his eighty-ninth year—an age attained by Lord Chief Baron Palles, who died a few months ago. The right Hon. Thomas Lefroy, who was made a Baron of the Irish Court of Exchequer in 1841 and Lord Chief Justice of Ireland in 1852, and presided over the Court of Queen's Bench with *éclat* till 1866, when he retired in his ninetieth year, lived till 1869, when he had entered on his ninety-fourth year. Mr. Thomas De Moleyns, Q. C., who had as a midshipman been on board H. M. S. *Bellerophon* when Napoleon in 1815 was placed in that ship as a prisoner of war, died in 1900, as Father of the Irish Bar, in his ninety-fourth year. Sir Thomas Staples, Bart., Q. C., the Queen's Advocate in Ireland, the last surviving member of the Irish House of Commons, and indeed of the Irish Parliament, died in 1865 in his ninetieth year." (150 L. T. 26, issue of July 10, 1920.)

8. Some of the statements in the opinion of the Circuit Court of Appeals are here considered.

(a) The learned court declared that since the instruction requested by the plaintiff, incorporated the element of "existing condition of body" and the term "impending", it was inconsistent with the *prima facie* provision of the statute. We have seen, however, that the factors which set the statute in motion and give rise to a rebuttable presumption, do not constitute a definition of the term "in contemplation of death"; and we respectfully submit that we have shown that the only definition

which fixes a standard possible of application is one which recognizes apprehension of impending death due to existing illness, infirmity or peril, as the moving cause of the transfer.

(b) The opinion of the learned court repeatedly refers to transfers *inter vivos* in contemplation of death as testamentary transfers. This designation fails to distinguish between the character of the conveyance and the legislative policy underlying the transfer tax act, for as we have seen a transfer *inter vivos*, though made in contemplation of death, is not ambulatory until death, nor is there any infirmity in the grant. The error of describing an absolute gift as a testamentary transfer is of special significance when the transfer in issue is one which was completed in every respect and passed title, possession and enjoyment to the donee before the enactment of the taxing law.

(c) The learned court declared that the instruction requested by the plaintiff did not take into account the fact that the grantor's age was beyond the scriptural limit. In a preceding point we have cited many proofs to show that advancing years, without more, are not enough to establish contemplation of death. It is not denied that if an aged man, though not critically ill, is so feeble or infirm that he must expect his early dissolution, a gift made by him may be held to have been in contemplation of death. Such a case, however, comes directly within the definition contended for by us, which takes into account existing infirmity whether due to age

or other cause, and necessarily includes the case described.

(d) The learned court held that the state decisions in New York, Illinois, Wisconsin and California do not completely or uniformly support the definition for which we here contend. It is respectfully submitted that the court was in error in so holding, and that the foregoing review, with quotations from the leading cases in the four states mentioned, shows that the definition contended for by us is not only fortified by, but is based upon the established law in these states. The development of the law in New York has been shown, and it has appeared by quotation from the *Crary* case, mentioned in the opinion below, that the views stated therein are not at variance with the prevailing definition. The learned court refers to *Matter of Dee* as the case which definitely rejected in New York the earlier limitation of gifts in contemplation of death to gifts *causa mortis*, but we have shown that this view had already been abandoned in *Matter of Price*, preceded by *Matter of Palmer*, although the latter cases did not go to the New York Court of Appeals. Furthermore we have shown that in Illinois, *Rosenthal v. People*, and the recent case of *People v. Danks* (which the opinion below fails to mention) are direct authority for the definition here submitted. The Wisconsin and Kentucky cases are in harmony with Illinois, as shown by the extracts reproduced. The opinion below rejects the California decisions on the ground that a statutory definition governed them, but as we have shown, six of the seven California cases involved transfers which

antedated the definition, and were controlled by the generally accepted and prevailing definition which we here contend should govern the federal Estate Tax Act in the absence of a definition therein.

9. The statutory definition adopted in California in 1911, is here considered.

The definition incorporated in the California statute by amendment in 1911 reads as follows:

"The words 'contemplation of death', as used in this act, shall be taken to include that expectancy of death which actuates the mind of a person on the execution of his will, and in nowise shall said words be limited and restricted to that expectancy of death which actuates the mind of a person making a gift *causa mortis*; and it is hereby declared to be the intent and purpose of this act to tax any and all transfers which are made in lieu of or to avoid the passing of property transferred by testate or intestate laws."

It is stated in *Estate of Reynolds*, as already noted, that this definition merely elucidated without changing the existing law, but *Estate of Pauson* holds to the contrary, and points out that the statement in *Estate of Reynolds* is dictum only, since the transfer involved therein was made before the statutory definition was adopted. The definition resolves itself into three parts, which we may briefly consider in turn.

The first provides that the term shall include that expectancy of death which actuates the mind of a person on the execution of a will. Obviously, this clause standing alone, fixes an impossible standard. It is based upon the supposition that a uniform expectancy of death actuates the mind of every testator on the

execution of his will, but this supposition has no basis in actual experience. One person may make his will on his death bed, another on the eve of his marriage; one testator may be eighty years of age, another eighteen. It is impossible to say that all testators no matter what their age, or state of health, or condition in life, contemplate death within the meaning of the statute whenever they make a will. People make wills frequently very early in life, but they do so because death is an eventuality to be guarded against, and not because they contemplate the likelihood of dying within the immediate or even remote future. The prospect of death no more influences them than it does a person who takes out a policy of life insurance.

The second provision of the definition is that the term shall not be restricted to that expectancy of death which is present in a gift *causa mortis*. This clause does not deal with gifts *causa mortis* as such, but with "that expectancy of death which actuates the mind of a person making a gift *causa mortis*". However, the clause does nothing more than carry into the statute language which was used in 1909 in *Matter of Price*, *supra*, p. 25, and in 1904 in *Rosenthal v. People*, *supra*, p. 22, and repeated in 1916 in *Spreckels v. State*, *supra*, p. 32, which involved a transfer antedating July 1, 1911, and in which the pre-existing law was applied.

If the quotations from these three cases are compared with sections 1149 and 1150, Civil Code Cal., *supra*, p. 15, it will be readily apparent that the provision that contemplation of death should not be restricted

“to that expectancy of death which actuates the mind of a person making a gift *causa mortis*” means that the term is not to be limited to gifts *in extremis* described in section 1150 as “made during the last illness of the giver, or under circumstances which would naturally impress him with the expectation of a speedy death”. Gifts so made are presumptively revocable, and it is common to consider all gifts *causa mortis* as deathbed gifts or gifts made under the circumstances described in section 1150. But as we have already pointed out, and as is shown in section 1149, a gift may be made in contemplation of death even though the donor be not in that extreme condition which carries with it the presumption that the gift is revocable. It is the taxation of these gifts that is supported by the cases we have referred to, and it is to codify the rule established in these cases that the clause under review was inserted in the amendment of 1911.

The third provision declares that it is the intent and purpose of the act to tax any and all transfers which are made in lieu of, or to avoid the passing of property transferred by testate or intestate laws. It was argued in *Estate of Pauson*, 199 Pac. 331, that this provision was a statement of the legislative policy underlying the entire act, and that in a proper construction of the amendment the provision was not to be regarded as limited to or a part of the definition of the term in contemplation of death. The Supreme Court of California held, however, that the provision was a part of the definition and that by its enactment the legislature had intended to enlarge the generally accepted meaning of the term.

PART TWO.

The Circuit Court of Appeals erred in its conclusion that the Internal Revenue Act of 1864 taxed past transfers and that the Estate Tax Act of 1916 is similar in scope and effect to the act of 1864.

In the court below the Government argued that the act of 1916 is similar to the internal revenue act of 1864, and that as the earlier act had imposed a tax on past transfers (according to the Government contention) it followed that the same result was intended in the act of 1916. The plaintiff argued on the other hand that neither act taxed past transfers, and furthermore that the act of 1916 was modeled upon the state statutes and was altogether different in scope and effect to the act of 1864. The Circuit Court of Appeals adopted the Government contention, saying:

“In our opinion, a *transfer* intended to take effect in possession or enjoyment after the grantor's death would, under this statute [the act of 1916] be taxable although made before the passage of the act. *Wright v. Blakeslee*, 101 U. S. 174, 176. The natural inference would be, in the absence of substantial evidence to the contrary, that the same result was intended as to transfers made in contemplation of death.” [269 Fed. 325, top.]

Wright v. Blakeslee was a case which construed and applied the internal revenue act of 1864 (13 Stat. 287), and in citing the case as authority for the construction of the act of 1916 the Circuit Court of Appeals must

be deemed to have held in line with the Government contention (a) that the act of 1864 taxed past transfers, and (b) that the act of 1916 is similar in scope and effect to the earlier act, as construed and applied in *Wright v. Blakeslee*. In the succeeding pages we hope to show that the learned court was in error in both of these conclusions. We shall point out that the acts of 1864 and 1916 are totally dissimilar; and furthermore that whether the act of 1916 was based upon the act of 1864 or upon the state statutes, there is no support whatever in any of these statutes or in any other statute, federal or state, for holding that the act of 1916 imposes a tax upon past transfers. Indeed, up to the time of the act of 1916 no statute, state or federal, had ever taxed past transfers. Moreover, a comparison of the act of 1916 with the act of 1864 and the state statutes referred to, shows that Congress did not intend to make the act of 1916 applicable to past transfers.

Reference may first be made to the English succession duty act of 1853, which the Government claims is the exact model of our act of 1864. The following provisions in parallel columns (in which Section 127 of the act of 1864 and Section II of the act of 1853 are set out in full) show that this claim of the Government is untenable, and that there are important differences between the two acts:

Act of 1864.

Sec. 126. . . . the term "succession" shall denote the devolution of title to any real estate.

Sec. 127. And be it further enacted, That every past or future disposition of real estate by will, deed, or laws of descent, by reason whereof any person shall become beneficially entitled, in possession or expectancy, to any real estate, or the income thereof, upon the death of any person dying after the passing of this act,

shall be deemed to confer, on the person entitled by reason of any such disposition, a "succession"; and the term "successor" shall denote the person so entitled; and the term "predecessor" shall denote the grantor, testator, ancestor, or other person from whom the interest of the successor has been or shall be derived.

Under the act of 1864 no tax arises, *unless and until* a person "*shall become beneficially entitled in possession or expectancy to any real estate*". The tax

Succession Duty Act—1853.

I. . . . The term "succession" shall denote any property chargeable with duty under this act.

II. Every past or future disposition of property, by

reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a "succession"; and the term "successor" shall denote the person so entitled; and the term "predecessor" shall denote settlor, disponent, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived.

arises when the beneficial entitlement occurs, and this is true whether the "disposition" which results in the beneficial entitlement occurred before or occurs after the passage of the act. In other words, whether the "disposition" is "past or future", there is no tax unless a person "*shall become* beneficially entitled," i. e., *after the passage of the act.*

This is not true of the English act of 1853. It imposes a tax whether the beneficial entitlement occurred before or occurs after the effective date of the act. The English act in terms provides that if any person "*has become* beneficially entitled", a tax is payable notwithstanding the fact that the disposition was made and the beneficial entitlement occurred before the act. Thus, under the act of 1864 the disposition may have been before or after the act, but the beneficial entitlement must have occurred after the act; under the English act, the beneficial entitlement, as well as the disposition, may have occurred before the act.

A comparison of the two acts shows that Congress deliberately avoided the use of the retroactive verbs which appear in the act of 1853, and which are underscored in our quotation from the statute. In addition to the instance above referred to—the omission from the act of 1864 of the words "has become"—note should also be taken of the omission of the words "to have conferred".

The changes made by Congress make it clear that the act of 1864 was designed to and did lay a tax only on a future event, and that the only function performed by the words "past disposition" was to indicate the legis-

lative intent that the tax should be laid upon an event occurring after the passage of the act, even though that event had had its origin in a conveyance made before the statute was passed. It cannot be said that such a tax is a tax upon a past disposition. Indeed, if the act had been intended to tax past dispositions as such, it would have referred to them in comprehensive terms. But it does not do so; it mentions only those past dispositions which were of such a nature that they could give rise to a beneficial entitlement after the passage of the act.

The act of 1864 imposes the tax when "any person shall become beneficially entitled, in possession or expectancy". The words "shall become" were designed to show that only those persons should be taxed who became (i. e., *after the passage of the act*) "beneficially entitled", and that if any person thus became "beneficially entitled" (i. e., *after the passage of the act*) he was subject to a tax whether the interest acquired by him was [an estate] "in possession" or [an estate] "in expectancy". In other words, the tax was laid upon the acquisition of title, and if the interest acquired was a beneficial interest the donee was subject to a tax whether he acquired a future interest (in expectancy) or a present interest (in possession).

Returning now to the opinion of the Circuit Court of Appeals in the case in suit, the court's error becomes readily apparent. Its conclusion, as shown by the excerpt from the opinion quoted above, rests on the erroneous premises (a) that the act of 1864 taxed past transfers; and (b) that the act of 1916 is similar in

structure and effect to the act of 1864. The opinion does not state the foregoing propositions in terms, but the decision necessarily rests upon them as shown by the conclusion reached, and by the authority cited.

But the learned court was in error in assuming that *Wright v. Blakeslee* held that the act of 1864 taxed past transfers, for neither that act, nor any other act, state or federal, has ever been held to have taxed past transfers. The court was also in error in assuming that the act of 1916 was modeled upon the act of 1864. The two acts are constructed upon entirely different plans. The act of 1916 taxes the transfer, not the beneficial entitlement; it makes no mention of a "past disposition"; and in describing the transfers which it taxes, it incorporates the clauses of the state statutes upon which it was based, and not the language or framework of the act of 1864.

If we were to assume, however, that the act of 1916 was modeled upon the act of 1864, it would still be impossible to say that it imposes any tax upon past transfers as such. If it followed the earlier act, the tax would only be imposed in respect of certain future events arising out of past transfers, namely, beneficial entitlement after the act, consequent upon a future interest or mere expectancy outstanding at the passage of the act. Hence, the act of 1864, and cases arising under it, are no authority whatever for holding that the act of 1916 imposes a tax upon past transfers, and especially are they no authority for holding that the act taxes a past transfer which gave rise to no future interests or expectancies, but which was absolute in character and

which vested title, possession and enjoyment in the donee immediately it was made, and before the act was passed.

It was argued in the Circuit Court of Appeals that no authority can be found in the act of 1864 or in the cases arising under it upon which to sustain the imposition of a tax upon a past transfer under the act of 1916; that the later act taxes (a) transfers in contemplation of death, which may be absolute in form and create no future interests, and (b) transfers to take effect at death, which ordinarily create future interests, and it taxes both classes in the same clause of the statute, putting both in the same bracket and upon the same plane; that no argument or construction can be sustained which is not equally applicable to both classes of transfers; and finally, that any argument based on the act of 1864 is altogether inapplicable to transfers whereunder no beneficial entitlement could occur after the passage of the act.

Instead of accepting this argument, the learned court held, and we respectfully submit erred in doing so, that the act of 1864 taxed past *transfers* which created future interests, that the act of 1916 should be held to have done the same, and that since the later act taxed this class of transfers, it was reasonable to infer that past transfers in contemplation of death were also intended to be taxed, even though they had created no future interests. In other words, the Circuit Court of Appeals failed to note that the only occasions taxable under the act of 1864 were those occurring after the passage of the act, and that therefore the act was altogether

inapplicable in the case of a "past disposition" under which no future interest or expectancy was outstanding at the time of the passage of the act, and no beneficial entitlement occurred after the act.

In the foregoing comment on the opinion of the Circuit Court of Appeals, we have said that no act, state or federal, has ever been held to have taxed past transfers. It may also be said that no act, state or federal, has ever imposed a tax upon the coming into possession of a vested remainder which was outstanding when the act was passed, except the New York law of March 14, 1899,⁹ invalidated in *Matter of Pell*, 171 N. Y. 48, 63 N. E. 789, to which we shall presently refer.

It cannot be said that *Wright v. Blakeslee* holds that the act of 1864 imposes a tax on the coming into possession of an already vested remainder. It holds merely that an occasion taxable under the act arose when the remaindermen involved in the case became beneficially entitled after the passage of the act, although the devise out of which the beneficial entitlement arose became effective before the act. The opinion declares that up to the death of the life-tenant the remaindermen "had no interest in the land except a bare contingent remainder expectant upon her death and their surviving her", and holds that the remaindermen "**first** became

(9) "All estates upon remainder or reversion, which vested prior to June thirtieth, 1885, but which will not come into actual possession or enjoyment of the person or corporation beneficially interested therein until after the passage of this act, shall be appraised and taxed as soon as the person or corporation beneficially interested therein shall be entitled to the actual possession or enjoyment thereof." (Laws of New York, 1899, p. 409, Chap. 215.)

beneficially entitled" at the life-tenant's death. As this event occurred after the passage of the act the tax was upheld.

The construction of the act of 1864 can best be ascertained by first considering the operation of the act with respect to a "future disposition" of property. A "future disposition" may immediately vest in the grantee an estate in possession,¹⁰ or it may vest in him a future interest. In either event, a beneficial entitlement occurs, for the words of the act are "shall become beneficially entitled [a] in possession [b] or expectancy" and this clause makes taxable the acquisition of a vested future estate as well as a vested estate in possession. The tax was upheld in *Wright v. Blakeslee*, not because the remaindermen obtained an estate in possession, but because they obtained a *vested* estate. The court would necessarily have decided that a beneficial entitlement had occurred even if the bare "contingent remainder" had been transformed into a vested future interest instead of into a vested estate in possession.

It cannot be said, however, that a second taxable occasion was intended to arise in respect of the same disposition, when the vested future interest of the person who had become beneficially entitled after the passage of the act, was later transformed into a vested estate in possession. The act imposes but one tax; the event out of which the tax arises is the beneficial entitlement; and the tax arises

(10) See *Scholey v. Rew*, 23 Wall. 331 (1874), for a case of a future disposition which immediately vested an estate in possession in the beneficiary. The case involved a devise in fee made in the will of a testatrix who died in 1869.

when this beneficial entitlement **first**¹¹ occurs, whether it be to a *vested* estate in possession or to a *vested* future interest. The purpose of the alternatives "in possession or expectancy" is to provide that a beneficial entitlement shall arise in either case, and not to provide that a change in the form of the estate, after beneficial entitlement has occurred, shall constitute a taxable occasion.

Clapp (Collector of Internal Revenue) *v. Mason* (devisee in remainder), 94 U. S. 589 (1881), was a case involving a future disposition creating vested remainders, and in it this court declared that beneficial entitlement was the occasion out of which the tax arose under the act of 1864. Mason, senior, died in 1867 and by his will devised certain real estate to his widow for life, with remainder to his son and nephew. The widow died in 1872, and in the meantime the act of July 14, 1870, was passed, which repealed the taxes imposed by the act of 1864, except such as should have "accrued" before October 1, 1870 (16 St. 256, §§ 3, 17). The case therefore presented two questions: (a) whether the devise of the estate in remainder created a beneficial entitlement in 1867 and (b) if it had, when did the tax accrue?

Answering the first question, this court held that under section 127 of the act, a beneficial entitlement occurred and a succession arose in 1867, and said:

"We readily admit . . . that the will of Mr. Mason conveyed an estate to William P. Mason and Charles H. Parker [the son and nephew] and that, although they were not entitled to immediate possession, they had a vested estate, and that the

(11) "The children of Henrietta Wright **first** became 'beneficially entitled' to the property in question at their mother's death [which occurred after the act was passed]."

Wright v. Blakeslee, 101 U. S. 174, 177.

succession to such an estate was made taxable.”
(94 U. S. 590, foot.)

It was further held, however, that under subsequent provisions of the statute, the tax was not required to be paid until the remaindermen obtained possession, and that as this had not yet occurred, the tax had not accrued (become payable) within the meaning of the repealing act.

It will be noted that the tax was not a tax upon coming into possession, but was a tax upon beneficial entitlement. Obviously, if the act had imposed a tax upon coming into possession, this court “would have accepted that short way to the decision of the case, and not have occupied itself with other and more complex questions” (237 U. S. 234) for the Mason remaindermen had not come into possession when the repealing act of 1870 was passed, and the case would have been summarily disposed of on that ground if coming into possession were the taxable occasion. That the act taxed only the beneficial entitlement is further brought out by a reference in the opinion to sections 134 and 144. Section 144 provides that “upon application made by any person who shall be entitled to a succession *in expectancy*”, the tax might be assessed and its present worth computed, and the amount so determined paid immediately by the holder of the future interest. Section 134 provides that if between the beneficial entitlement and the due date of the tax, different persons should successively become entitled to the estate in expectancy, only one tax should be payable but it should be computed at the highest rate which, if every succeeding owner of the estate in expectancy had been

subject to duty, would have been payable by any of them. Thus, if a remainder were devised to a stranger, with remainder over to a nephew, and then to a son, and the son came into possession, the rate of tax would be the rate applicable to a stranger (6%), and not that applicable to a nephew (2%) or to a son (1%).

The two sections referred to, and the extract which we have quoted from the opinion in *Clapp v. Mason*, clearly show that the act of 1864 taxed the beneficial entitlement, that a taxable occasion occurred when the testator died and before the remaindermen came into possession, and that an inchoate but existing liability for the tax arose at once, even though the date for the accrual (payment) of the tax was postponed.

Let us now consider the case of a "past disposition". It is plain that the statute does not differentiate between the event which gives rise to a tax in the case of a "past disposition" and the event which gives rise to a tax under a "future disposition". Therefore, having found what that event is under a future disposition, we know that in the case of a past disposition the same combination of circumstances must exist¹² (and must, of course, occur *after the passage of the act*), although they may be referable to, or have their origin in, a past

(12) If words in a statute are claimed to give the act retroactive as well as prospective operation, it should be an unfailing rule, first to consider the interpretation of the act applied prospectively, and after that is defined and made certain, then to determine whether the act can be made to operate retroactively with the same interpretation. If the words of the act have a certain effect operating prospectively, they must have the same effect operating retrospectively, or no retrospective effect at all; for it is inconceivable that the same words should accomplish different results working forward and backward.

conveyance. Thus, in the case of a past, as well as of a future disposition, a person becomes beneficially entitled when he acquires title to a vested future interest, and if this event occurs before the act, a tax cannot be said to arise after the act on the theory that a subsequent beneficial entitlement occurs when the vested future interest is transformed into an estate in possession.

We have mentioned the New York law of March 14, 1899, invalidated in *Matter of Pell*, as the only statute, state or federal, which has ever imposed a tax upon the coming into possession of a vested remainder outstanding when the act was passed. A brief summary of the transfer tax laws of New York, and of the circumstances which led up to the law of 1899, is appropriate here for the light it throws upon the situation in New York (from which most of the state statutes have been taken) and for its general importance in the history of transfer taxation.

The New York laws from 1885 to 1899 may be reproduced as follows:

New York laws of June 30, 1885, and June 25, 1887:

Sec. 1. After the passage of this act, all property which shall pass by will or by the intestate laws of this state or [be] . . . transferred by deed [etc.] . . . made or intended to take effect in possession or enjoyment after the death of the grantor . . . or by reason whereof any person shall become beneficially entitled in possession or expectancy to any property . . . shall be and is subject to a tax. (Laws of New York, 1885, Chap. 483, p. 820; 1887, Chap. 713, p. 921.)

New York law of April 20, 1891:

Sec. 1. After the passage of this act, all property which shall pass by will or by the intestate

laws of this state or [be] . . . transferred by deed [etc.] . . . made in contemplation of the death of the grantor . . . or intended to take effect in possession or enjoyment after such death . . . or *by reason whereof any person or body politic or corporate shall become beneficially entitled in possession or expectancy to any property* . . . shall be and is subject to a tax. (Laws of New York, 1891, Chap. 215, page 409.)

New York law of May 1, 1892:

Sec. 1. A tax shall be and is hereby imposed upon the transfer of any property . . . in trust or otherwise, to persons or corporations . . . in the following cases:

(1) When the transfer is by will or by the intestate laws of this state from . . . a resident of the state;

(2) When the transfer is by will or intestate law, of property within the state, and the decedent was a non-resident of the state;

(3) When the transfer is . . . by deed [etc.] . . . made in contemplation of the death of the grantor, . . . or intended to take effect in possession or enjoyment at or after such death. *Such tax shall also be imposed when any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer, whether made before or after the passage of this act.* (Laws of New York, 1892, vol. 1, page 814, Chap. 399.)

New York law of March 14, 1899:

All estates upon remainder or reversion, which vested prior to June thirtieth, 1885, but which will not come into actual possession or enjoyment of the person or corporation beneficially interested therein until after the passage of this act, shall be appraised and taxed as soon as the person or corporation beneficially interested therein shall be entitled to the actual possession or enjoyment thereof. (Laws of New York, 1899, p. 409, Chap. 215.)

The italicised provision in the New York law of May 1, 1892, was construed in *Tallmadge v. Seaman*, 9 Misc. 303, 30 N. Y. S. 304 (1894), affirmed in *Matter of Seaman*, 147 N. Y. 69, 41 N. E. 401 (1895); and also in *Matter of Forsyth*, 10 Misc. 477, 32 N. Y. S. 175 (1894); and it was held that the provision did not impose a tax in cases where a beneficial entitlement to a vested remainder had occurred before the passage of the act, although possession was not obtained until after the passage of the act.

The idea underlying *Matter of Seaman* is well brought out in the following extract from the opinion, into which we have introduced bracketed matter to show the full effect of the extract when read in connection with the rest of the opinion.

“A grantor may have conveyed and delivered his deed before 1892, in contemplation of death and to take effect [as a transfer of title] upon the happening of that event, or reserving a power of revocation, as well as the possession or enjoyment during his lifetime; and the legislature certainly intended to put such a transfer on the same footing as one by will. It is of no consequence that the will was executed before the statute if the death occurs after, and the same rule was intended to be explicitly applied to grants causa mortis [because we hold such a gift to be inchoate and ambulatory until the death of the grantor]. Though the deed [above mentioned, which is to take effect as a transfer of title only when the grantor dies] precedes the tax law, as the execution of the will precedes that law in a possible case, yet the transfer in both instances is to date from the one event which makes it operative and effective [the death of the donor or testator as the case may be].” (147 N. Y. 77, 41 N. E. 403.)

The provision of the New York law of 1892 was adopted, with an inconsequential modification, in California in 1911. It has also been adopted either in the New York or California form in eleven other states, including the seven states mentioned on page 56 of the Brief for Plaintiffs in Error herein. In the margin we reproduce the provision as it appears in these seven states.¹³

The California statute, before and after the incorporation of the New York provision, is as follows:

(13) **Colorado.** "When any person, institution or corporation becomes beneficially entitled in possession or expectancy to any property or the income therefrom, by any such transfer, whether made before or after the passage of this act."

Illinois. "When any such person, institution or corporation becomes beneficially entitled in possession or expectancy to any property or the income therefrom, by any such transfer, whether made before or after the passage of this act."

Indiana. "When any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof, by any such transfer, whether made before or after the passage of this act."

Michigan. "Such tax shall also be imposed when any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer, whether made before or after the passage of this act."

Minnesota. "Such tax shall be imposed when any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof, by any such transfer, whether made before or after the passage of this act."

Rhode Island. "Such tax shall be imposed when any such person becomes beneficially entitled, in possession or expectancy, to any property, or interest therein, or the income therefrom, by any such transfer, whether made before or after the passage of this act."

South Dakota. "Such tax shall be imposed when any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property, or the income thereof, by any such transfer, whether made before or after the passage of this act."

California law from 1893 to 1911:

Sec. 1. After the passage of this act,¹⁴ all property which shall pass, by will or by the intestate laws of this state (or) . . . which shall be transferred by deed (etc.), . . . made in contemplation of the death of the grantor . . . or intended to take effect in possession or enjoyment after such death . . . by reason whereof any person or body politic or corporate shall become beneficially entitled, in possession or expectancy, to any property . . . shall be and is subject to a tax.

California law from 1911 to present time:

Sec. 2. A tax shall be and is hereby imposed upon the transfer of any property . . . in trust or otherwise, to persons, institutions or corporations . . . in the following cases:

(1) When the transfer is by will or by the intestate . . . laws of this state, from . . . a resident of the state.

(2) When the transfer is by will or intestate laws of property within this state and the decedent was a nonresident of the state. . . .

(3) When the transfer is . . . by deed (etc.) . . . in contemplation of the death of the grantor . . . or intended to take effect in possession or enjoyment at or after such death. *When such person, institution or corporation becomes beneficially entitled, in possession or expectancy, to any property, or the income therefrom, by any such transfer, whether made before or after the passage of this act.*

In *Hunt v. Wicht*, 174 Cal. 205, 162 Pac. 639, it was held that if the italicised clause in the 1911 statute were

(14) From 1893 to 1899, section one commenced with the words "after the passage of this act", following the form of the New York laws 1885-1891, but the words were dropped in 1899, without altering, however, the purely prospective nature of the act.

assumed to apply to already vested interests, it would be unconstitutional; and in the very recent case of *Estate of Potter*, 63 Cal. Dec. 141, decided by the Supreme Court of California on February 2, 1922, it was held that the clause *was not intended* to apply in cases where vested future interests were acquired before the passage of the act. In the latter case, the court, after quoting the 1911 statute, italicised as above, said:

“It is claimed that the italicised clause of the last sentence shows the legislative intent to impose a tax on previous transfers, so far as lawfully possible. . . .

We have seen that the legislature had no power to add to or take from the tax upon the gift of 1908 after it was made. If taken literally and apart from its immediate context, the clause above italicised would express the intent to do so, but the result would be that under the rule established by *Hunt v. Wicht* and the other cases first above cited the act would be to that extent unconstitutional and void. Such a result, as we have seen, is to be avoided, when it can be fairly done. We must, therefore, look to the context to ascertain if a meaning is apparent that would produce a result that does not make the subdivision retroactive in effect and brings it within the scope of the legislative power. The first part of this final sentence or clause, in connection with the opening part of the subdivision, states that such transfer tax is to be imposed ‘when such person, institution or corporation *becomes* beneficially entitled, in possession or expectancy, to any property’. In a very common acceptation of its meaning the word ‘becomes’ betokens futurity; something that is yet to happen. The right of the state to the tax is not to vest until the person to be charged therewith ‘becomes beneficially *entitled*’ to the property. This evidently refers to some time after the passage of the act, and in view of the fact that it would be

void if it referred to a past vesting of title, it must be presumed that it was intended to refer to a future vesting of title, in possession or expectancy. This would make it inconsistent with the literal meaning of the last clause unless we find that there may be a vesting of title, a becoming *entitled*, after the passage of the act, which vesting arises from a 'deed, grant, bargain, sale, assignment or gift' executed before the passage of the act, whereby the words may have literal effect upon transfers vesting in future. It is obvious that the phrase 'such transfer' in the last clause refers back to these methods of transfer, and that the clause is to be understood as if it read: 'by any such deed, grant, bargain, sale, assignment or gift, whether made before or after the passage of this act.'

'A future interest is either: 1. Vested; or, 2. Contingent;' (Civ. Code, sec. 693.) 'A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property, upon the ceasing of the intermediate or precedent interest.' (Civ. Code, sec. 694.) 'A future interest is contingent whilst the person in whom, or the event upon which, it is limited to take effect remains uncertain.' (Civ. Code, sec. 695.) It is competent for the legislature to impose a tax upon any transfer of this character, where the property passing by transfer does not become vested under it until after the act imposing the tax is enacted. Transfers are often made under these sections by some instrument in writing, whereby contingent interests are created to pass in the future and which do not become vested until years after the execution of the instrument. . . . Bearing in mind the aforesaid constitutional limitations upon legislative power, we may easily see that the phrase 'becomes beneficially entitled, in possession or expectancy', was intended to include, among others, estates or interests of this character where the instrument creating them was made before the passage of the act and the contingent title thereby provided for should not become vested

until after its passage. With this possibility in mind, we see at once the occasion and purpose of the insertion of the clause 'whether made before or after the passage of this act'. It was intended to make it clearly include instruments of transfer of this character. Thus all the words of the section may have a clear practical effect in full harmony with the constitution. This, we think, must be held to be its true meaning. The result is that it is not retroactive in effect, that it was not so intended, and that this section does not, by implication or otherwise, refer to or affect the gift which vested in 1908."

Carter v. Bugbee, 92 N. J. L. 390, 106 Atl. 413, is a case in harmony with the decisions in *Wright v. Blakeslee*, *Matter of Seaman*, and *Estate of Potter*. Under the conveyance in question and the New Jersey law by which it was governed, the remaindermen named in the grant acquired no interest until the happening of the contingency upon which they *first* became beneficially entitled, and as this occurred after the act, the tax was upheld. The decision is stated in the syllabi in the official report and the reporter system, which we quote in the order named:

"A tax upon the transfer of property that has been made the subject of an irrevocable deed of gift intended to take effect in possession, so far as the beneficiary is concerned, at the death of the settlor, is valid although imposed under authority of a statute not in existence at the time of the execution of the deed of gift, *when the right, title and interest of the beneficiary in the subject-matter of the gift does not vest in him or her until the death of the settlor, and the enactment of the statute antedates that event.*"

"A transfer tax can be legitimately imposed by the legislature upon property which has already

been made the subject of a deed of trust, *when such deed does not operate to transfer the title to such property until after the tax act comes into being,*
”

We return now to the New York law of 1899. After the Court of Appeals had decided in *Matter of Seaman* that the act of 1892 taxed only a beneficial entitlement occurring after the passage of the act, the New York legislature passed the law of March 14, 1899, which sought in express terms to tax the coming into possession of remainders after the act by remaindermen who had become “*beneficially interested*” before the act. The law was so framed that it left no question of construction open. Its validity was assailed, however, on the ground, among others, that the tax imposed was not a transfer tax but a direct property tax, and when the question came before the Court of Appeals in *Matter of Pell*, the tax was declared invalid, the court holding that a tax upon the coming into possession of an already vested remainder is a direct property tax.

To sum up—the act of 1864 did not tax past transfers, and *Wright v. Blakeslee* decided nothing more than that a beneficial entitlement taxable under the act arose when a “bare contingent remainder” became a vested estate in possession after the passage of the act. The New York law of 1892 and the state statutes taken from it did not tax past transfers, or the coming into possession of vested remainders. The New York law of 1899 attempted to tax coming into possession, but the attempt failed because a direct property tax cannot be imposed in the guise of a succession tax.

We repeat, therefore, that up to the time of the law here under review, no law, state or federal, had ever taxed past transfers, and that the only law which ever sought to tax the coming into possession of a vested remainder was held invalid.

It follows that whether it be held that the act of 1916 was based upon the act of 1864 or upon the state statutes, there is no authority of any kind based upon a previously enacted law to support a holding that the act of 1916 taxes past transfers.

It is of prime importance to note moreover that if the act of 1916 had been designed to tax past transfers, Congress had a number of statutes before it which contained words that might have been adopted to express this purpose. These statutes did not tax past transfers, as we have seen, but the act of 1864 contained the term "past disposition" and a number of the state statutes contained the words "transfer made before or after the passage of this act". If, therefore, Congress had had the taxation of past transfers in mind, there were phrases ready to its use which it might have adopted and which would have clearly expressed its purpose. It did incorporate one of these phrases in 1918. But it did not use either term in the act of 1916 and it should accordingly be held that it did not intend in that act to tax past transfers.

CONCLUSION.

It is respectfully submitted that for the reasons stated, the Circuit Court of Appeals erred in approving the definition of contemplation of death contained in the instruction of the trial court; and that the learned court also erred in its conclusion that the act of 1864 taxed past transfers, that the act of 1916 is similar in structure to the act of 1864, and that the act of 1916 taxes past transfers.

San Francisco, April, 1922.

GARRET W. McENERNEY,
Amicus Curiae.



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IN THE
Supreme Court of the United States

October Term, 1921

No. 200

VICTOR E. SHWAB, Executor of the Last
Will and Testament of Augusta Dickel,
Deceased,

Plaintiff in Error,

vs.

EMANUEL J. DOYLE, United States Col-
lector of Internal Revenue for the Fourth
Collection District of Michigan,
Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SIXTH
CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

1. This is an action at law brought by Victor E. Shwab, Executor of the will of Augusta Dickel, deceased against Emanuel J. Doyle, United States Collector of Internal Revenue for the Fourth Collection District of Michigan, to recover an estate tax of \$56,548.11, exacted by the Collector and paid under protest. The suit was brought in the District Court of the United States for

the Western District of Michigan, Southern Division, and was tried before Judge Sessions and a jury. All points of law raised by plaintiff in error (hereinafter usually referred to as plaintiff), respecting the validity of the tax, were ruled against him by the District Judge, and nothing was submitted to the jury except the sole question whether a transfer made by Mrs. Dickel to the Detroit Trust Company in April, 1915, was made in contemplation of death within the meaning of that term as defined by the court (Trans. 167-168). Under this charge the verdict was for defendant (Trans. 20), and judgment was entered thereon (Trans. 20).

2. After this decision in the District Court bill of exceptions was settled (Trans. 26), assignments of error were filed (Trans. 213-226), writ of error and citation issued (Trans. 226-229) and the cause taken for review to the United States Circuit Court of Appeals for the Sixth Circuit. The cause was argued in that court at the June Session in 1920 (Trans. 232), and in December of that year judgment was entered affirming the decision of the District Court (Trans. 233); the ground of the decision in the Circuit Court of Appeals being different, in material respects, as we shall later point out, from the ground of decision assigned in the lower court. The case is reported 269 Fed. Rep. 321. Thereupon petition was filed by plaintiff for writ of error from this court to review the judgement of the United States Circuit Court of Appeals (Trans. 247), the writ of error was allowed (Trans. 254), assignments of error were filed (Trans. 254-271), with prayer for reversal (Trans. 271) bond was filed and approved (Trans. 272-273), and the cause was duly brought to this court for review. The writ of error from this court was duly issued under authority of *Spreckels Sugar Refining Company vs. McClain*, 192 U. S. 397.

3. The tax in question was imposed by the Collector upon the transfer or trust deed made by Mrs. Dickel to the Detroit Trust Company. The trust deed bears date April 21, 1915 (Trans. 179) and was executed and acknowledged by Mrs. Dickel at Nashville, Tennessee, on April 22, 1915 (Trans. 30, 186). It was delivered at that time to Charles P. Spicer, Vice-President and Secretary of the Trust Company, (Trans. 27, 41) and taken by him to Detroit (Trans. 31); but, inasmuch as the Trust Company's by-laws required the signatures of two officers to such documents, the trust deed was signed by Mr. Spicer and Mr. Stone in the Company's behalf at Detroit, and was acknowledged by them under date of June 3, 1915, (Trans. 30, 31, 186).

4. By this trust deed Augusta Dickel transferred to the Detroit Trust Company approximately \$1,000,000 in bonds. The deed is printed in the record (pp. 179-188). The transfer is in trust to invest and reinvest and to pay the net income for life to Victor E. Shwab, or on his written order. After his death the net income is to be paid to six beneficiaries (children of Victor E. Shwab and Emma B., his wife) viz: Louise Lindenberg, Augusta S. Davis, Elizabeth ("Bessie") S. Tate, Felix E. Shwab, Hugh M. Shwab, and J. Buist Shwab. By its terms the trust is to continue for the life of Victor E. Shwab and the lives of the other six beneficiaries above named and the life of the survivor of them, and in the meantime the income (after the death of Victor E. Shwab) is payable to the six beneficiaries. As each of the six beneficiaries dies, his or her share of the income goes to his or her issue, if any, and if there be none, then to the surviving beneficiaries. At the termination of the trust the principal fund goes to the children of the six beneficiaries, or their issue, if such children be deceased, in manner as more particularly specified in the trust deed, except

that, if the issue of any of the six beneficiaries be then extinct, George A. Shwab (another child of Victor E. and Emma B. Shwab), or his issue if he be then dead, will be entitled by the terms of the trust deed, to participate with the issue then living of said six beneficiaries in the distribution of said lapsed shares (Trans. 183-185).

5. The trust deed was an absolute conveyance of the securities therein mentioned. It took effect upon its delivery on April 22, 1915 (Trans. 31, 41). The grantor, Mrs. Dickel, reserved to herself no life use of the property or other benefit or advantage but divested herself of all right or title therein (Trans. 179-188).

6. Augusta Dickel was the widow of George A. Dickel. Her fortune, a portion of which only was conveyed to the Detroit Trust Company, came to her through the firm of George A. Dickel & Company, of Nashville, Tennessee. The firm was originally composed of Mr. Dickel and one Salzkotter. Mr. Shwab entered the business in 1866 and became a member of the firm in 1871 (Trans. 75). Five or six years later Mr. Salzkotter retired from the firm. Thereafter it was composed of Mr. Dickel and Mr. Shwab, who were related to each other in that their wives were sisters (Trans. 75-76). In 1894 Mr. Dickel died. After his death his widow, Augusta Dickel, took over his interest, and she and Mr. Shwab continued the business as partners down to her death, some twenty-two years later (Trans. 75-76, 84, 93). George A. Shwab, son of Victor E., acquired a working interest in the firm. Victor E. Shwab managed and controlled the business, Mrs. Dickel paying no attention thereto, receiving no written statements, and seldom or never asking any questions about it. This appears from the testimony of Mr. Shwab (Trans. 75, 76, 77, 90, 95) and Mr. Vertrees (Trans. 102, 105, 107, 108). Mrs. Dickel had her individual bank-account. Mr. Shawb kept her supplied with

funds in this account, and the bank was instructed to honor any check she was pleased to draw, without regard to the condition of the account (Trans. 76-77, 135).

7. Upon cross-examination of Mr. Shwab it was shown by counsel for the Government, that at the death of her husband, Mrs. Dickel's interest in the firm was of the value of about \$250,000 (Trans. 93). The business was so well managed by Mr. Shwab that, when the trust deed of April 21, 1915, was made, Mrs. Dickel's property was of the value of \$1,700,000 to \$1,800,000 (Trans. 100). The trust deed conveyed securities of the value of \$975,000 (Trans. 5), and the estate retained by Mrs. Dickel was valued at her death at \$855,596.39 (Trans. 3). Practically all of her property at the date of the trust deed consisted of her one-half interest in George A. Dickel & Co. In addition to her interests in that firm, or which were derived therefrom, she received an inheritance, about three or four years before the trust deed was executed, of \$25,000 or \$30,000 (Trans. 94, 102).

A portion of the capital of the firm of George A. Dickel & Co. was actually employed in its business, but, in addition thereto, out of the firm's accumulations, investments were made in interest-bearing or income-producing securities. These consisted of bonds and stocks which were not divided between the partners, but were retained by the firm. The bonds and stock certificates were kept in the firm box in the Fourth and First National Bank of Nashville (Trans. 93, 94, 77).

8. Mrs. Dickel never had a child. She had some cousins in Europe or the United States, but does not appear to have kept up or possessed any relations of intimacy with them. Mr. Shwab testifies that he never met any of them (Trans. 76). These cousins of Mrs. Dickel's were, of course, cousins of Mrs. Shwab also.

Mrs. Dickel's only near relatives were Mrs. Shwab and her children. The latter stood to Mrs. Dickel practically in the relation of her own children (Trans. 76, 105).

For a year or two after Mr. Dickel's death his widow and the Shwabs lived in the country near Nashville, in adjoining houses. She then gave up her own house and went to Mr. Shwab's house to reside (Trans. 76, 83). From that time she continued to live with the Shwabs. They removed to another house in Nashville and she lived with the Shwabs as one of the family. The title to this home, however, stood in Mrs. Dickel (Trans. 90.).

9. Mrs. Shwab was much younger than Mrs. Dickel, and Mrs. Dickel looked upon her more as a daughter than a sister, and was very devoted to both her and her children (Trans. 76). The relations between Mrs. Dickel and Mr. and Mrs. Shwab and their children continued to be close and affectionate throughout Mrs. Dickel's life. This appears from the testimony of Mr. Vertrees (Trans. 105, 106), Miss Schell (Trans. 57, 59), Dr. Oughterson (Trans. 61, 64), Hager (Trans. 70), Ambrose (Trans. 74, 75), Dr. Eve (Trans. 112). Dr. Eve says that Mrs. Dickel thought as much of the Shwab children as if they had been her own (Trans. 112).

Mrs. Dickel was accustomed to make allowances to some of the Shwab children. To Felix she gave an allowance of \$200 or \$250 a month; to Bessie the same; to Buist she gave no regular allowance, but supplied him with money whenever he needed it (Trans. 76). In addition to these amounts she gave the children substantial sums (Trans. 76). Mr. Vertrees refers to the fact that Mrs. Dickel was generous with the children, and that the Shwab family were the only persons Mrs. Dickel expected ever to enjoy her estate (Trans. 106).

10. The affectionate relations existing between Mrs. Dickel and the various members of the Shwab family

are shown by her will, bearing date May 26, 1915, somewhat more than a month after the execution of the trust deed (Trans. 195-197). By this will, she gave to her sister, Mrs. Shwab, all household and personal effects; to each of the seven Shwab children \$5,000; directed that the partnership business might be continued or wound up as Mr. Shwab should determine; and then gave the residue of her estate to Victor E. Shwab. Mrs. Dickel's reason for this bequest of her residuary estate is best shown in the language of the will itself. In item 5 she says:

"I have a valuable estate, and no near relatives other than my sister, Emma B. Shwab, and her children, and they are all dear to me. I wish them to receive and enjoy the benefit of my estate. My brother-in-law, Victor Emanuel Shwab, and I have long been jointly interested in business affairs, and I have great confidence in him and in his judgment. He and his wife, my sister Emma, and I have considered the disposition of our estates and agreed as to what under all the circumstances will be best for those for whom it is our desire to provide. Accordingly, and to that end, I give and bequeath, and will and devise, all my property not hereinbefore disposed of, of every kind, wherever situated, real, personal, and mixed, to my brother-in-law, Victor Emanuel Shwab of Davidson County, Tennessee, absolutely. My sister will understand why it is I have bequeathed nothing to her. She has an abundance and well knows my affection for her, and that I have in contemplation that form of disposition of my estate which eventually will benefit those she loves so dearly—the children of her union with her husband, Mr. Shwab."

11. Mrs. Shwab was in poor health for many years, and in May, 1914, suffered a stroke of paralysis (Trans. 77). She was in critical condition when the trust deed was executed and later when Mrs. Dickel executed her will (Trans. 57-58, 67-68), and down to the time of the trial (Trans. 121-122, 42, 72).



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12. In 1910 or 1911, Mr. Shwab and his family, including Mrs. Dickel, went to Charlevoix, Michigan, to spend the summer, and from that time spent every summer at that place. It was the custom to go to Charlevoix the latter part of May or the first of June, and to remain until some time in September or October. The members of the family so spending the summer at Charlevoix were Mr. and Mrs. Shwab, Mrs. Dickel and the children or some of them, and their families as the children married (Trans. 77, 44). One of the daughters usually remained with Mr. and Mrs. Shwab and Mrs. Dickel and the others had cottages of their own (Trans. 77-78, 44).

13. About 1914, there came up for consideration the question which finally resulted in the execution of the trust deed. The undisputed proofs show that the creation of this trust was first suggested because of the State tax laws of Tennessee. It is so testified by Mr. Shwab (Trans. 78-81), and Mr. Vertrees (Trans. 103, 106). See correspondence (Trans. 176-179, 190-195).

Under the laws of Tennessee, tax-payers are required to make "returns" of *personal* property, and in the event of failure so to do, the assessor proceeds to assess on his own information otherwise obtained. This is called a "forced assessment." (Trans. 141) The chief deputy in the county tax assessor's office was sworn as a witness for defendant (Trans. 137). He testified, against plaintiff's objections, that blank tax schedules of personal property, with written demand for return, were mailed to Mr. Shwab and other tax-payers each year (Trans. 138, 139, 207). These blanks were mailed to a mere fraction of the taxpayers, to 1500 or 1800, perhaps, out of all the tax-payers of Davidson County, in which Nashville is situated (Trans. 141). Not more than one-third of those to whom these blanks were mailed, made the returns demanded. Upon the remaining two-thirds such assess-

ments were made as the assessor thought proper (Trans. 141). The tax, if levied pursuant to the "forced assessment" thus made, was upon the *ad valorem* basis, and hence much heavier upon personal securities than in those States where securities may be exempted upon payment of a specific tax. The chief deputy county assessor testified that the total tax, State, County and City, at Nashville was approximately \$3.20, and, upon that basis, if a tax-payer in Nashville returns for taxation a million dollars worth of personal property, the amount of the tax would be \$32,000 per year (Trans. 142). This would reduce the income of a five per cent bond by taking therefrom three and two-tenths per cent annually upon the par value of the bond out of the five per cent which it yields (Trans. 142).

14. With a view to the creation of this long time 'rust under laws more favorable than those of Tennessee, Mr. Shwab made inquiry into the tax-laws of various States. Mr. Vertrees was counsel of George A. Dickel & Co. and had occupied that relation since about 1900 (Trans. 78, 102). At Mr. Shwab's request, Mr. Vertrees obtained the opinion of Michigan counsel on the question of taxation in that State of personal securities (Trans. 78, 103).

On January 26, 1914, Mr. Vertrees wrote to Travis, Merrick & Warner, Grand Rapids, Michigan, informing them that he had a client who spent her summers in Michigan and thought of making her home in that State, and that she desired to be informed respecting the laws relating to taxation of bonds and stocks in that jurisdiction (Trans. 78, 103; Exhibit G; Trans. 190). On February 11, 1914, Travis, Merrick & Warner wrote to Mr. Vertrees in reply, informing him that in Michigan the laws allowed bonds secured by mortgage, whether in

Michigan or elsewhere, to be made exempt from general taxation upon paying one-half of one per cent thereon (Exhibit H; Trans. 190-192).

On March 10, 1914, Mr. Shwab wrote to the Treasurer of the Detroit Trust Company, stating that one of his relatives was considering the creation of a trust consisting of several hundred thousand dollars of bonds, and desired to know the cost of handling such a trust. In this letter Mr. Shwab expressed the wish to take advantage of the Michigan tax-laws (Exhibit A; Trans. 176). Under date of March 13, 1914, the Detroit Trust Company by Mr. Spicer, its vice-president, replied to this letter. Mr. Spicer informed Mr. Shwab that, in order to secure the advantages of the recent Michigan law, authorizing the payment of a specific tax of one-half of one per cent upon mortgages, bonds, notes, etc., it would be necessary for the owner to be a resident of Michigan, or to create a trust of such character that the title of the property would be vested in a Michigan trustee (Exhibit B; Trans. 176-177).

A letter of advice upon the same subject was obtained by Mr. Shwab's son-in-law, Otto H. Lindenberg, from C. H. Stearns, of Kalamazoo, who was attorney at that place of a corporation in which Mr. Lindenberg was interested (Trans. 79-80; Exhibit J; Trans. 192-193).

Mr. Shwab took up this same subject with Lisle Shanahan, an attorney at Charlevoix, and obtained a letter of advice from him under date of July 27, 1914, (Trans. 80; Exhibit K; Trans. 193-194). Mr. Shanahan submitted to Mr. Shwab letters from the Auditor General and Attorney General of Michigan relative to the interpretation of the tax-laws in that State (Trans. 80-81; Exhibits L and M; Trans. 194-195).

In the course of these investigations there was correspondence upon this same subject with the Fidelity

and Columbia Trust Company, of Louisville, Ky., (Trans. 79; Exhibit I; Trans. 192). Inquiries were also made of trust companies in New Jersey, Delaware and New York (Trans. 79) and the tax-laws of other States were considered in this connection (Trans. 81, 109). Mr. Vertrees testified that he considered the law of Michigan upon this subject to be very satisfactory, and that the laws of Tennessee did not afford any such inducements upon this head (Trans. 105-106). Defendant's witness Jones, the chief deputy county assessor of Davidson County, also testified that Tennessee has no law like that of Michigan, whereby, upon payment of a specific tax, bonds or other securities can be exempted from *ad valorem* taxation (Trans. 142).

Mr. Shwab says, in this connection, that the idea was to create a trust in a State where the properties would not be too heavily taxed, and that they found the law of Michigan more favorable than anywhere else (Trans. 95). He adds that he was advised that the laws of Tennessee did not permit the placing of stocks and bonds in trust on payment of a percentage thereby escaping other taxes (Trans. 99).

15. For the reasons thus detailed by himself and Mr. Shwab, Mr. Vertrees prepared a trust deed, and either delivered it to Mr. Shwab or transmitted the same to him at Charlevoix. Mr. Vertrees also wrote to Mr. Shwab with reference to the form of the instrument (Trans. 103; Exhibit W; Trans. 205-206; Trans. 81). Mr. Vertrees says that the trust instrument then prepared by him was actually signed, though never acknowledged by Mrs. Dickel; that it was never used or seen by the Detroit Trust Company, and was destroyed by him when the deed of trust was finally drawn under date of April 21, 1915 (Trans. 104).

Mr. Vertrees was absent from Nashville during the summer of 1914 (Trans. 103), and the subject-matter of this trust deed was laid aside until April, 1915. This was not because of any consideration of Mrs. Dickel's health, but rather because the execution of such an instrument was *not* a pressing matter. The severe illness of Mrs. Shwab (Trans. 81) as well as the absence of Mr. Vertrees, Mrs. Dickel and Mr. Shwab from Nashville, contributed to delay the execution of the instrument (Trans. 103, 77).

16. The subject was again taken up in the spring of 1915 (Trans. 103-104, 28). A redraft of the proposed deed of trust was prepared by Mr. Vertrees (Trans. 104) and under date of April 15, 1915, Mr. Shwab wrote to the Detroit Trust Company enclosing the document. He asked whether any alterations were necessary in order to make the instrument conform to the provisions of Michigan law, and suggested a conference at Nashville on the subject, inasmuch as Mrs. Shwab's health was such that he could not leave her (Exhibit C; Trans. 177-178). On April 17, 1915, Mr. Spicer, for the Detroit Trust Company, made reply to this letter, and suggested a meeting at Nashville on April 20 (Exhibit D; Trans. 178-179). Mr. Spicer went to Nashville at the appointed time and met Mr. Shwab and Mr. Vertrees (Trans. 28, 104, 81). Various changes were made necessitating a redrafting of the instrument, and, when those were tentatively agreed upon, Mr. Spicer said that he had not seen Mrs. Dickel and would like to do so. He went alone to interview her (Trans. 104, 82, 29). The interview was satisfactory. The trust deed of date April 21, 1915, was executed and acknowledged by Mrs. Dickel on April 22 (Trans. 29, 30 186), delivered to Mr. Spicer at the time (Trans. 29, 31) and he thereupon left for his home (Trans. 29, 104). Mr. Shwab asked Mr. Spicer to take the bonds with

him, but the latter did not wish to carry them in his grip, and they were sent by express to the Detroit Trust Company shortly thereafter (Trans. 31, 82).

17. In May, 1915, Mr. Vertrees prepared wills for Mrs. Dickel and Mr. and Mrs. Shwab. Mrs. Shwab was then in critical condition of health, and the three wills were executed at the same time because of her condition, it being supposed that it would excite her less than if she alone were called upon to execute a will. This is shown by the testimony of Mr. Vertrees (Trans. 105, 109). Mr. Shwab (Trans. 84), and Miss Schell (Trans. 57-58). Hager's testimony to the same effect was in large part excluded (Trans. 67-68).

Mrs. Dickel had purchased a home in Charlevoix in February, 1914 (Trans. 82-83), and she became a citizen of Michigan at or about that time (Trans. 98), and she so described herself in her will (Trans. 195). The testimony shows that Mrs. Dickel made two wills. In the first she left her property to the Shwab children (Trans. 96). In the last she gave personal effects to her sister, money legacies to the Shwab children, and the residue of her estate to her brother-in-law, Mr. Shwab (Trans. 195-197, 36, 105).

Mrs. Shwab was not expected to live when the trust deed of April 21, 1915, was made, and hence she was not a beneficiary thereunder (Trans. 95). She was still very desperately ill, and the family had little hope of her recovery, when the wills were made in the following month (Trans. 57-58, 105, 109, 84). Mrs. Dickel was aware that the greater part of her fortune had been made by Mr. Shwab. She knew that he was a man of large means and equal partner with herself and worth as much as she (Trans. 100). She also knew his treatment of her sister. She trusted him implicitly and had absolute confidence in his integrity and ability. She knew that

she could trust him to care for his wife and children, who were the primary objects of her bounty (Trans. 95-96). This is shown by the testimony of Mr. Vertrees (Trans. 105), and her will speaks emphatically to the same effect (Trans. 196-197).

18. When Mrs. Dickel made the trust deed her condition was good, both mentally and physically. She was not afflicted with any incurable malady or disease. She was cheerful in disposition, not despondent or wanting in hopefulness. All this appears from the testimony of Mr. Shwab (Trans. 83), Mr. Vertrees (Trans. 105), Miss Schell (Trans. 56-57), Dr. Armstrong (Trans. 43) and every other witness sworn on this point. Mrs. Dickel was in good health and had no illness until about two weeks prior to her death (Trans. 43, 83-84, 99, 71). She died at Charlevoix on September 16, 1916. (Trans. 84) nearly seventeen months after the execution of the deed of trust (Trans. 179-186). Her attending physician, at the time of her death, was Dr. Armstrong, of Charlevoix. He says that, until a couple of weeks before her death, her health was very good for a woman of her years (Trans. 43), and that the cause of her death was apoplexy (Trans. 46).

19. Mrs. Dickel expected to go abroad in the year following that in which the trust deed was made. Miss Schell testifies that Mrs. Dickel had been to Europe six or seven times and talked of going again (Trans. 57), and that she intended to take Miss Schell with her (Trans. 58-59). Mr. Shwab corroborates this (Trans. 90). Miss Schell is a professional nurse and was called in the second week of April 1915, to attend Mrs. Shwab and remained in the household for six weeks (Trans. 56). She testifies that she was a member of the family at the time of the execution of the trust deed. Miss Schell says that she saw a great deal of Mrs. Dickel;

that Mrs. Dickel did not require any assistance but did everything for herself; that her room was upstairs; that others in the house used the elevator but that Mrs. Dickel never used it; that she walked up and down the steps; that she read a great deal; went out frequently for long drives; that she was very proud of her good health (Trans. 56-57).

Miss Schell went to Charlevoix in 1916. She accompanied Mrs. Dickel in the capacity of nurse because of the fracture of the arm which Mrs. Dickel had sustained some ten days before she left for Charlevoix (Trans. 58). Miss Schell says that she remained with Mrs. Dickel from June 1st until August 5th, 1916, and that her condition was very good until a couple of days before Miss Schell returned to Nashville (Trans. 58).

20. Dr. Oughterson was called to attend Mrs. Shwab in 1914 and saw Mrs. Dickel frequently (Trans. 59-60). He testifies that he never saw Mrs. Dickel when she was ill; that he saw her socially very frequently upon his visits to the Shwab home; that he thought she was one of the brightest women mentally that he had ever met and the most sensible and reasonable one he had ever met; that as a matter of fact her reason was so good that she was hardly to be classed with the average woman; that she was perfectly normal in every way; that she appeared to be about 70 years of age; that she never discussed with him the question of death or her apprehension about death being imminent or anything like that; that she was always cheerful and hopeful in disposition and hoped the war would soon be over for she had planned to go to Europe and take baths at Nauheim for a little stiffness in her knee (Trans. 60-61); that when Mrs. Dickel fractured her arm in May, 1916, Dr. Oughterson administered the anaesthetic and Dr. Eve set the arm; that there was nothing the matter with Mrs. Dickel

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except the fracture, and her mental attitude was good and clear as could be; that she was not at all despondent or apprehensive; that she hoped to be able to get away and not delay the plans of the family to go to Michigan (Trans. 61-62). On page 63 of the Transcript, Dr. Oughterson states that he thought Mrs. Dickel was mentally one of the most exceptional women he ever met; that she had the fairest minded view of things in general of any woman he ever met and was very just in all her criticisms and conversations and conduct towards people in every way possible. Dr. Oughterson testifies that Mrs. Dickel led a sedentary life and would occasionally have little attacks of constipation, but that was all he treated her for (Trans. 60-61); that she had one stiff joint but he never knew whether it was rheumatism or an injury to one of the cartilages (Trans. 62).

On cross-examination, Dr. Oughterson says that Mrs. Dickel would laugh about the idea of having a Doctor and said that if her knee was all right and she could get more exercise, she would not need anything (Trans. 64), that she was disappointed in not being able to make her trip to Europe as she had planned (Trans. 65).

21. Lon S. Hager was chauffeur for the Shwabs for nearly 13 years prior to the trial (Trans. 67). He testified that Mrs. Dickel was about the brightest old lady he ever knew; that her disposition was good; that she was always cheerful; that he never noticed anything in her conversation or conduct to indicate that she was at any time in apprehension of impending death or that death was near; that she wanted to go to Europe again as soon as Mrs. Shwab's health was such that she could get away (Trans. (69-70).

22. Mr. Ambrose, a family friend, went to Charlevoix with the Shwabs and Mrs. Dickel in the latter part of May or early in June, 1915. He testifies that Mrs.

Dickel's condition of health was good at that time; that he saw no difference between that and any other time; that she was apparently in very good spirits and that there was nothing in her conversation or conduct to indicate that she was at all apprehensive that her end was near (Trans. 72-73). Mr. Ambrose says that when they arrived at Charlevoix, Mrs. Dickel and he walked from the station to the cottage and that he asked her the names of the flowers and plants growing in that latitude which were strange to him, and she was familiar with the plants and flowers and gave him the names and talked very intelligently about them. He testifies that neither then or at any other time was there anything to indicate that she was apprehensive or despondent or fearful of death (Trans. 73).

23. Dr. Eve attended Mrs. Dickel from May 26, 1916, to June 13, 1916, and set her arm which was fractured just above the wrist. She then went to Charlevoix, with the other members of the Shwab household (Trans. 110-111). Dr. Eve testifies that Mrs. Dickel's mental and physical condition was first class; that she was a wonderful old lady in her vitality and her mental condition was just as strong as he ever knew in any one at her age. In justification of that statement, he says that any anaesthetic produces great excitement mentally usually, but that Mrs. Dickel took the anaesthetic at the time when her arm was fractured and reacted from it as nicely as any one he ever saw and only remained in bed about the time he had expected and when she was up engaged him most intelligently in conversation (Trans. 111). The Doctor says that he found conversation with Mrs. Dickel so pleasant that he often times tarried and talked with her; that she told him a great deal about her travels abroad; that she was not at all apprehensive of death, or if she was, did not manifest

it in any manner or mention it; that she acted more like a young person and thought she had a long lease on life; that she so talked and acted and was happy in every way (Trans. 111). He adds that her physical condition was very good; that if it had not been, the injury she had received and especially giving her the anaesthetic for the purpose of reducing the fracture, would have required her to remain in bed a great deal longer than she did; that this would have been necessary had her condition not been first-class; that she never complained of any of the ordinary conditions that old persons have; that she had the appearance of getting along well, being up and moving about; that he would find her out in the hall and see her walking about and getting up easily; that she always got up when he went in and said: "Let me show you how well my arm is doing;" that she moved it when he removed the dressing and would say that it looked well as if she could use it (Trans. 112).

24. Mr. Vertrees testifies as to his interviews with Mrs. Dickel relative to the preparation of her will and her desire for a change in it and her visit to his office for that purpose. He says that he saw nothing at any time to indicate that Mrs. Dickel was not in her usual health or that she was disturbed in any way or that she thought she was making any preparations with reference to the disposition of her estate because of any apprehension of impending death or anything of that kind; that this deed of trust so far as he knew or had any reason to believe, was not executed by reason of any apprehension or fear on her part of anything impending (Trans. 105). Mr. Vertrees says that the prime object of the execution of the trust deed was the tax advantages which it was supposed the laws of Michigan gave, in that one-half of one per cent might be paid upon securities in lieu of all the State, County and

Municipal taxes (Trans. 105). Mr. Vertrees adds that as a lawyer he realized that this was satisfactory; that he understood the statute could be changed and that it was for this reason that the clause was inserted in the deed of trust, giving certain parties the power not to revoke the trust, but to remove the trustee or substitute a trustee even in another State (Trans. 105-106).

25. Mrs. Dickel was born in 1838, and at the time of her death was about 78 years of age (Trans. 77).

26. The foregoing evidence respecting Mrs. Dickel's physical and mental condition at the date of execution of the trust deed is wholly undisputed. Defendant called no witness who knew Mrs. Dickel in her lifetime and adduced no evidence whatever respecting her health or condition, either physical or mental. An attempt was made by the defense to contradict Dr. Armstrong on one point. G. A. Geer, an assistant to the Revenue Agent in charge at Nashville, made investigation in this case for the Government (Trans. 151). He testifies that in the course of his investigation, for the purpose of the trial (Trans. 153), he saw Dr. Armstrong at Charlevoix in April, 1919, and that Dr. Armstrong told him that he took Mrs. Dickel's blood pressure at the beginning of her illness about September 1, 1916, and that it was 270. This, he says, was after she had had a stroke of apoplexy (Trans. 152). The witness first said that Dr. Armstrong stated that he could not recall definitely whether he observed the high blood pressure when attending Mrs. Dickel prior to her last illness (Trans. 153); but on cross-examination admitted that Dr. Armstrong told him at the interview in question that the only time he had definitely remembered taking Mrs. Dickel's blood pressure was during her last illness (Trans. 155-56).

Dr. Armstrong was interrogated on this subject on cross-examination. He testifies that Mrs. Dickel did have high blood pressure after her apoplectic stroke and just before she died (Trans. 46); that he took her blood pressure and it was 180 or 190; that it was not 270, and he did not so state to Mr. Geer; that he has seen only one blood pressure as high as 270 (Trans. 47), and that was in the case of another patient, whose blood pressure he had taken five or six years before the trial and who was still alive (Trans. 54).

The statement in the opinion of the Circuit Court of Appeals (Trans. 244) that, when the trust deed was made, Mrs. Dickel had arteriosclerosis is erroneous and without any foundation in the proofs. Dr. Armstrong's testimony is that Mrs. Dickel would not be aware that she had a high blood pressure unless somebody told her (Trans. 52); that he never told her, nor did anybody else so far as he knew; that he was not aware of it himself until the latter part of the summer of 1916 (Trans. 54). This is uncontradicted. Nor is there any testimony whatsoever in the case tending to show that Mrs. Dickel was aware, prior to her last illness, that she had a high blood pressure, nor that prior to that time, she did have high blood pressure in fact.

27. Defendant brought to Grand Rapids to attend the trial as witnesses in his behalf, three public officers at Nashville. These are Hume Jones, Chief Deputy in the County Tax Assessor's office (Trans. 137), A. D. Bell, State and County Tax Collector (Trans. 145), and Vernon H. Sharp, City Tax Assessor (Trans. 147). Against the objection of plaintiff (Trans. 139) defendant was allowed to prove by these witnesses that Mrs. Dickel made no return of personal property for taxation for the years 1912-1916, and was not assessed upon personal property for those years (Trans. 140, 146,

147); that Victor E. Shwab was assessed upon personal property at a valuation of \$20,000.00 or \$21,000.00 (Trans. 211-212, 146); that Geo. A. Dickel & Co. were assessed upon stock in trade, but upon no other personalty (Trans. 147-148). This testimony was offered and received upon the theory that it tended to rebut the claim of plaintiff that the trust was created in part for the purpose of taking advantage of the Michigan tax-laws (Trans. 139). Yet defendant's own witness, the chief deputy in the county tax assessor's office, testified that, while among men of wealth at Nashville, possessed of securities like notes and bonds, it was not the custom to make returns (Trans. 142), and most such holdings escape taxation (Trans. 145), such personalty if returned, would have been placed upon the rolls at full value and taxed at the rate of 32 mills (Trans. 142); and furthermore that, if the assessor knew of its existence, he would have put it upon the rolls for *ad valorem* taxation (Trans. 145).

28. Mrs. Dickel died, as we have already said, on September 16, 1916 (Trans. 84). Eight days before her death the Act of Congress of September 8, 1916, became effective whereby an estate tax is imposed. After her death Mr. Shwab took steps to pay Collector Doyle this estate tax. He filed his return as executor (Trans. 84-85; Exhibit O; Trans. 197-198), and voluntarily paid an estate tax amounting to \$31,242.12, being the tax imposed upon the net estate, appraised at \$804,842.24 (Trans. 3). This was the value of the estate owned by Mrs. Dickel at the time of her decease, without taking into consideration the value of the property conveyed by her to the Detroit Trust Company by the trust deed of April 21, 1915. This trust deed, it will be borne in mind, was executed by Mrs. Dickel nearly one year and five months prior to her decease,

and approximately the same length of time prior to the enactment of the Federal Estate Tax Law (Trans. 179-186).

Under date of November 10, 1916, Mr. Shwab, as executor, gave notice to Collector Doyle of Mrs. Dickel's death, and enclosed therewith his return as executor (Trans. 84; Exhibit O; Trans. 197-198). In this letter Mr. Shwab called the attention of Collector Doyle to the circumstance that Mrs. Dickel had executed a deed of trust in April, 1915, for the benefit of himself, and, after his death, for the benefit of six of the children of himself and Mrs. Shwab. He set forth, however, that the conveyance was not intended to take effect at her death, but at once, and that it did in fact take effect immediately; and that Mrs. Dickel did not make the deed in contemplation of death. He also stated that he was advised that the Act of Congress had no retroactive operation, and for these reasons that the bonds covered by the deed of trust should not be included as a part of Mrs. Dickel's estate (Trans. 197-198). Attached to this letter was a copy of the trust deed (Trans. 86).

29. The Collector of Internal Revenue insisted that an estate tax should also be paid by Mr. Shwab upon the transfer evidenced by the trust deed of April 21, 1915 (Trans. 87); and under date of December 7, 1917, the Collector assessed upon the estate of Augusta Dickel an internal revenue tax in the sum of \$56,548.41, the same being an additional estate tax, so called, imposed upon said estate. On the same day the Collector made formal demand for the payment of this additional estate tax, on or before December 17, 1916, under threat of enforcing the same with a penalty of five per cent and interest at one per cent per month from due date until paid (Trans. 101; Exhibit S; Trans. 203). The amount demanded, being the above sum of \$56,548.41, was an

additional tax of \$59,136.05 less \$2,587.64 previously deposited by Mr. Shwab to make good an increase in the tax occasioned by an increase in the valuations placed on certain parcels of real estate (Trans. 86-87, 203). This sum of \$56,548.41 therefore, was the precise amount of the additional tax by reason of the assessment upon the transfer to the Detroit Trust Company.

30. December 17, 1917, was approximately one year and ninety days after the death of Augusta Dickel and marked the end of the period in which the estate tax could be paid without penalty. On December 15, 1917, because of this demand and of the fear of incurring the penalties threatened, Mr. Shwab paid to the Collector of Internal Revenue, under protest, the additional tax of \$56,548.41 (Trans. 87, 101). At the time of making this payment he filed with the Collector a formal letter of protest, setting forth the reasons why he believed the tax should not be assessed against him and demanding that the money be returned (Trans. 87; Exhibit Q; Trans. 199-201). The receipt furnished by Collector Doyle was marked "Paid under protest" (Trans. 101; Exhibit T; Trans. 203-204).

31. On December 21, 1917, Mr. Shwab, as executor of Mrs. Dickel's will, filed with the Collector of Internal Revenue, a formal appeal to the Commissioner of Internal Revenue for the refund of this tax, which he was improperly compelled to pay (Trans. 101). This appeal also set forth the reasons why the moneys paid should be returned to him, which reasons were the same as those in the letter of protest (Exhibit R; Trans. 201-203).

32. On May 27, 1918, the Commissioner of Internal Revenue rejected the claim (Trans. 101; Exhibit V; Trans. 204-205). The claim being thus rejected and the

moneys paid by plaintiff not having been refunded, this suit was thereupon begun against the Collector to recover the same (Trans. 1).

33. The assignments of error filed by plaintiff are 71 in number (Trans. 254-271). They may be grouped, for purposes of argument. The points which we shall argue in this court are the following:

(1) The Act of September 8, 1916, is not retrospective in character and will not be construed to impose a tax upon the deed of trust of April 21, 1915, executed and delivered nearly seventeen months before the enactment of the law.

(2) If the Act of September 8, 1916, could be construed to be retrospective and to impose a tax upon the transfer of April 21, 1915, it would be unconstitutional and void as a denial of due process of law, and the taking of private property for public use without compensation, and would constitute an unapportioned direct tax and an exaction not within the taxing powers of Congress.

(3). The tax cannot be defended upon the interpretation given by the District Judge to the Act of September 8, 1916, to the effect that such Act taxes merely the "net estate" owned by Mrs. Dickel at the time of her death, but that the amount of such tax is measured also by the value of the transfer of April 21, 1915. Such interpretation is unauthorized by the statute, and, even if authorized, creates an unconstitutional exaction.

(4) The deed of trust was not made by Augusta Dickel in contemplation of death and was not taxable under the Estate Tax Law. There was error in submitting this question to the jury.

(5) Errors prejudicial to plaintiff were committed in the admission and exclusion of evidence.

SPECIFICATION OF ERRORS.

(1) With regard to the first point in the argument, we specify the errors relied upon as follows:

The affirmance of the Trial Court's refusal to direct the verdict for plaintiff (Trans. 165; Assignment of Error 40; Trans. 219, 262).

The affirmance of the refusal to grant plaintiff's first, second and eleventh requests to charge (Trans. 156, 159, 170; Assignments of Error 41, 42 and 51; Trans. 220, 223, 263 and 267). The requests so refused are as follows:

41. "Upon the undisputed proofs, your verdict must be for the plaintiff in this cause."

42. "Upon the undisputed proofs in this cause, you are instructed to find a verdict in favor of the plaintiff, and against the defendant, for the amount paid by plaintiff to defendant under protest, for estate tax, upon the transfer of date April 21, 1915, made by Augusta Dickel to Detroit Trust Company, the amount of such estate tax being \$56,546.41; and in arriving at your verdict you will also add interest on said sum at five per cent (5%) per annum from December 15, 1917, the date of such payment, down to the present time."

51. "I instruct you that the Act of Congress of September 8th, 1916, is not retrospective in character, and that it does not impose a tax upon the deed of trust of date April 21, 1915, executed and delivered by Augusta Dickel to the Detroit Trust Company before the enactment of the law."

The affirmance of the charges to the jury mentioned in Assignments of Error 53 and 54 (Trans. 166, 171, 224, 267-268). The charges so given are as follows:

53. "The law authorized the taking into consideration, in certain instances and under certain conditions, of property which had been transferred absolutely, prior to the death of the person making the transfer, in arriving at the amount of the tax which was to be computed."

54. "Among other provisions of the law was one which, in substance, authorized the taking into consideration by the Tax Collector or the Commissioner of Internal Revenue, in levying the tax, property which had been transferred without consideration, that is, as a gift, at any time prior to the death of the person making the transfer, provided that such transfer when it was made, was made in contemplation of death."

The denial of plaintiff's motion for new trial (Trans. 174, 176; Assignment of Error 64; Trans. 226, 270), and the holding of the Circuit Court of Appeals that the Act of September 8, 1916, was intended to reach absolute conveyances in contemplation of death made before the passage of the Act (Assignment of Error 66; Trans. 234-237, 270).

(2) The assignments of error upon which we rely with regard to the second point are as follows:

We rely upon Assignments 40, 41, 42, 53, 54 and 64 mentioned in point one, *supra*. We also specify the affirmance of the denial to grant plaintiff's twelfth request to charge (Trans. 170, Assignment of Error 52; Trans. 223, 267). The request so refused is as follows:

52. "I instruct you that if the Act of September 8, 1916, could be construed to be retrospective and to impose a tax upon the transfer of April 21, 1915, it would be unconstitutional and void as a denial of due process of law, and the taking of private property for public use without compensation, contrary to the Fifth Amendment to the Constitution of the United States."

We also specify Assignment of Error 67 to the holding of the Court of Appeals that the Act of September 8, 1916, when intended to reach absolute conveyances made before the passage of the Act, is not unconstitutional, and if applied to the deed of trust of April 21, 1915, is not void as denying the due process of law or as violating

the Fifth Amendment to the Constitution, but is within the taxing power of Congress and would not be classified as a direct tax (Trans. 237-239. 270).

(3) The errors which we specify with regard to the third point are the same as those specified with regard to points one and two above mentioned.

(4) In connection with the fourth point we specify assignments of error 40, 41, 42, 53, 54 and 64 above mentioned. We also specify the following errors:

The affirmance of the refusal to charge the jury as requested in plaintiff's second request to charge (Trans. 263; Assignment of Error 43). The request so refused is as follows:

"The deed of trust of date April 21, 1915, took effect on its execution and delivery in or about April, 1915. It did not take effect at or after Mrs. Dickel's death, but more than a year prior thereto, and also more than a year prior to the enactment by Congress of the Estate Tax Law. Forthwith upon delivery of the instrument, the legal title to the securities described in the trust deed passed from Mrs. Dickel to the Detroit Trust Company and vested in it. I therefore charge you that the defendant has no defense to this suit under that provision of the Act of Congress relating to the making of transfers or the creation of trusts to take effect in possession or enjoyment at or after the death of decedent."

The affirmance of the action of the District Court in refusing to charge the jury as requested in plaintiff's fourth request to charge (Assignment of Error 44; Trans. 264). The request so refused is as follows:

"The Act of Congress of September 8, 1916, provides, in substance, that the value of the gross estate of the decedent shall be determined by including the value at the time of her death, of all property, real or personal, to the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which she has created a trust in contemplation of death. I charge you that

the words 'in contemplation of death', do not refer to that general expectation of death which every mortal entertains, but rather the apprehension which arises from some existing condition of the body or some impending peril."

The affirmance of the action of the District Court in refusing plaintiff's fifth request to charge (Assignment of Error 45, Trans. 264). The request so refused is as follows:

"If you find that when Mrs. Dickel made the deed of trust in question, she was an old woman, somewhat enfeebled, as a result of old age, and that she must have known that she could not live many years longer, yet if you further find that she was then under no apprehension of death arising from some existing condition of body or some impending peril, I charge you that the deed of trust was not made by her 'in contemplation of death' within the meaning of that phrase, as used in the Act of Congress."

The affirmance of the refusal of the District Court of plaintiff's sixth request to charge (Assignment of Error 46; Trans. 264). The request so refused is as follows:

"It appears that Mrs. Dickel made the transfer to the Detroit Trust Company in or about the month of April, 1915, and that the Act of Congress, known as the Estate Tax Law, was not passed until September 8, 1916. I charge you, therefore, that there is no proof in this case tending to show that the transfer made by Mrs. Dickel to the Detroit Trust Company was made for the purpose of defrauding or evading the Federal Revenue Law."

The affirmance of the action of the District Court in refusing plaintiff's seventh request to charge (Assignment of Error 47; Trans. 265). The request so refused is as follows:

"In determining whether the transfer by Mrs. Dickel to the Detroit Trust Company was or was not made 'in contemplation of death' within the meaning of the statute, one of the elements proper to be con-

sidered is whether there was or was not an intent on the part of Mrs. Dickel to escape or avoid payment of the Estate Tax. Inasmuch as the Estate Tax Law was not passed by Congress until some sixteen months after the making of the transfer, I instruct you that this element of intent to escape or avoid the payment of the Estate Tax is wholly wanting in the suit at bar, and this is a circumstance which you are entitled to consider in arriving at your conclusion as to whether the transfer by Mrs. Dickel was or was not made in contemplation of death."

The affirmance of the action of the District Court in refusing plaintiff's eighth request to charge (Assignment of Error 48; Trans. 265). The request so refused is as follows:

"There is proof in this case tending to show that one purpose of the transfer made by Mrs. Dickel to the Detroit Trust Company was that the Detroit Trust Company was a corporation organized under the Michigan laws, and doing business in this State, and that, by virtue of the transfer so made, it would be possible to take advantage of the Michigan statute whereby securities of the character of those specified in the trust deed could be exempted from taxation upon paying to the County Treasurer of the proper county a tax of one-half of one per cent. under the Michigan laws. I charge you that Mrs. Dickel was lawfully entitled to make the transfer to the Detroit Trust Company with the intent and for the purpose of thus availing herself of the benefits of this Michigan tax law, or to enable the beneficiaries under the deed of trust to procure for themselves that advantage."

The affirmance of the action of the District Court in refusing plaintiff's ninth request to charge (Assignment of Error 49; Trans. 266). The request so refused is as follows:

"The Act of Congress provides that any transfer of a material part of the decedent's property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to her

death, without a fair consideration in money or money's worth, shall, unless shown to the contrary be deemed to have been made in contemplation of death, within the meaning of the Act. I instruct you that this does not mean that if the transfer is made within two years prior to the death of the decedent, it will be conclusively presumed that the transfer was made in contemplation of death, but only that if all the conditions recited in the Act exist, the burden of proof is shifted and there is raised, by the terms of the law, a presumption that the transfer is made in contemplation of death. In other words if the transfer is of a 'material part' of decedent's property; if it is 'in the nature of a final disposition or distribution thereof;' and if it is made 'within two years prior to his death' without consideration, it is not even then declared to be made 'in contemplation of death'. The Act merely declares that 'unless shown to the contrary' it shall, in such case, be deemed to have been made 'in contemplation of death'. But this is a presumption merely and may be rebutted by proofs in the cause, and I instruct you that if the plaintiff has shown, by a preponderance of evidence, that when Mrs. Dickel made the deed of trust in question she had only the general expectation of all rational mortals that she would die some time, but that she was then laboring under no apprehension of death arising from some existing infirmity or impending peril, the deed in question was not made 'in contemplation of death' within the meaning of those words, as used in the Act of Congress."

The affirmance of the action of the District Court in refusing to grant plaintiff's tenth request to charge (Assignment of Error 50; Trans. 266-267). The request so refused is as follows:

"There is testimony to the effect that in making Mrs. Dickel's income tax return for 1915, signed by Mr. Shwab in her behalf, there was included interest received during that year upon the securities in the hands of the Detroit Trust Company. Mr. Shwab has testified that this was done by mistake. I charge you that the fact that this item of interest

was so included in the tax return for that year signed by Mr. Shwab for Mrs. Dickel does not tend to show that the deed of trust of date of April 21, 1915, made by Mrs. Dickel to the Detroit Trust Company and executed and delivered more than a year before her death, was intended to take effect or did take effect at or after her death, nor does it tend to show that it was made by her in contemplation of death."

The affirmance of the action of the District Court in charging the jury as set forth in Assignment of Error 55 (Trans. 268), as follows:

"That presents the sole question for your determination: Did Mrs. Dickel, in April, 1915, transfer to the Detroit Trust Company the trust property in contemplation of death, that is to say at the time of making the transfer, did she have in contemplation her own death, and was that the reason for making the transfer to the Detroit Trust Company."

The affirmance of the charge mentioned in Assignment of error 56 (Trans. 268), as follows:

"On the other hand, the meaning of the term ('in contemplation of death') is not necessarily limited to an expectancy of immediate death or a dying condition. We speak of gifts causa mortis, that is, gifts made because the person is in death or is dying. That condition is not what is meant."

The affirmance of that portion of the charge mentioned in Assignment of Error 57 (Trans. 268), as follows:

"Nor is it necessary in order to constitute a transfer in contemplation of death, that the conveyance or transfer is made while death is imminent; while it is immediately pending by reason of bodily condition, ill health, disease or injury or something of that kind."

The affirmance of that portion of the charge mentioned in Assignment of Error 58 (Trans. 268-269), as follows:

"But a transfer may be said to be made in contemplation of death if the expectation or anticipation

of death in either the immediate or reasonably distant future is the moving cause of the transfer."

The affirmance of that portion of the charge mentioned in Assignment of Error 59 (Trans. 269), as follows:

"And in this case, if you find that Mrs. Dickel, in April, 1915, was moved to create a trust and to make the transfer to the Detroit Trust Company by her expectation or anticipation of death in either the immediate or the reasonably distant future then you will be warranted in finding that this transfer was made in contemplation of death."

The affirmance of that portion of the charge mentioned in Assignment of Error 60 (Trans. 269), as follows:

"In determining that question, you have a right to take into consideration all the evidence in the case. You have the right also to take into consideration the provisions of the statute which Congress has enacted in that regard, and upon that subject the statute is this: Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death, without consideration, shall unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title. By that statute Congress created a rule of evidence merely. That statute raises a presumption that if a transfer is made within two years of the death of the person making the transfer, it is presumed to have been made in contemplation of death, unless the contrary is shown; and the burden in this case is upon the plaintiff to establish by a fair preponderance of the evidence, taking into consideration the presumption which the statute creates, that this transfer was not made by Mrs. Dickel in contemplation of her death."

The affirmance of that portion of the charge mentioned in Assignment of Error 61 (Trans. 269), as follows:

"Take into consideration any other instruments, like wills that were executed about the same time."

The affirmance of that portion of the charge mentioned in Assignment of Error 62 (Trans. 269-270), as follows:

"Take into consideration all these matters and then say from the evidence in the case, bearing in mind the presumption which the statute raises and giving it the consideration to which it is entitled, and it is to be considered by you in connection with the other evidence in the case, whether or not that transfer by Mrs. Dickel to the Detroit Trust Company at that time was made by her in contemplation of her death."

The affirmance of that portion of the charge mentioned in Assignment of Error 63 (Trans. 270), as follows:

"On the other hand, if you find, from the evidence and all the evidence in the case, that the moving cause of that transfer was her expectation and anticipation of death, it will be your duty to find that the transfer was made in contemplation of death."

The holding of the Circuit Court of Appeals that the definition of a transfer in contemplation of death given by the Trial Judge is correct and that a time which is only reasonably distant is reasonably close (Trans. 239-244; Assignment of Error 68; Trans. 270-271).

The holding of the Circuit Court of Appeals that plaintiff's Assignments of Error 58 and 59, above mentioned, relative to the use of the word "distant" instead of the word "close" in connection with the word "future" in the definition of the Trial Judge were not based upon sufficient exceptions (Trans. 244; Assignment of Error 69; Trans. 271).

The holding that there was sufficient evidence for the jury to hold that the transfer of the deed of April 21, 1915, was made in contemplation of death (Assignment of Error 70, Trans. 244-246, 271).

The holding that the presumption afforded by Section

202 (b) of the statute was evidence to be considered by the jury (Trans. 246, Assignment of Error 71; Trans. 271).

(5) With respect to point five of the argument, we specify errors as follows:

The affirmance of the refusal to permit the witness Spicer to testify as to whether anything occurred with respect to Mrs. Dickel's appearance or actions that led him to think that her death was impending (Trans. 30; Assignment of Error 1; Transcript 213, 254-255).

The affirmance of the refusal to permit the witness, Maud Schell to testify whether there was anything especially depressing Mrs. Dickel (Trans. 57, Assignment of Error 2; Trans. 213, 255).

The affirmance of the refusal to permit Dr. Oughterson, Mrs. Dickel's physician, to testify relative to the disposition of old people, if everything is going well, to see no reason why they should not live on indefinitely (Trans. 66-67; Assignments of Error 4, 5, 6 and 7; Trans 214, 215, 255-256).

The affirmance of the refusal to permit the witness, Shwab, to testify as to whether he had any anticipation in 1915 that Mrs. Dickel was in danger of passing away (Trans. 83; Assignment of Error 16; Trans. 216, 258).

The affirmance of the striking out of the testimony of the witness Vertrees that the deed of trust was not executed by reason of any apprehension or fear on the part of Mrs. Dickel of anything impending (Trans. 106; Assignment of Error 17; Trans. 216, 217, 259).

The affirmance of the action of the District Court in compelling witness, Shwab, on cross-examination to answer questions concerning the placing of \$18,000.00 or more as the income of the bonds in trust in the income tax return of Mrs. Dickel (Trans. 134; Assignments of Error 26, 27; Trans. 218, 260).

The affirmance of the action of the Trial Court in compelling witness, Shwab, on cross-examination to answer questions concerning where the income of Mrs. Dickel was kept from April, 1915, to September, 1916 (Assignments of Error 20, 21, 22 and 23; Trans. 217, 259-260).

The affirmance of the action of the District Judge in compelling the witness Shwab to testify on cross examination as to the local Tennessee taxes paid by Mrs. Dickel, and the accepting in evidence of various tax notices (Trans. 122, 123, 139; Assignments of Error 18, 19, 28 and 29; Trans. 217, 218, 259, 261, 207, 212).

The affirmance of the action of the District Court in permitting the witnesses, Jones, Bell and Sharp, to testify as to taxes paid by Augusta Dickel, George A. Dickel & Company and Victor E. Shwab in Tennessee, and notices, assessments, schedules and other matters pertaining thereto (Assignments of Error 30-37; Trans. 218, 219, 261, 262; Trans. 139, 146, 147, 148).

The affirmance of the action of the District Court in refusing to permit the witness, Sharp, to answer as to how many returns of personal property for assessment he got from the 3,000 requests for return of personal property sent (Trans. 150, 151; Assignment of Error 38; Trans. 219, 262).

Upon this point we also rely upon Assignments of Error 43, 45, 50 and 64 mentioned in preceding point four.

ARGUMENT.

I.

The Act of September 8, 1916, is not retrospective in character and will not be construed to impose a tax upon the deed of trust of April 21, 1915, executed and delivered nearly seventeen months before the enactment of the law.

The first point which we urge upon the attention of the court is that the deed of trust of April 21, 1915 (Trans. 179-188), is not within the terms of the Federal Estate Tax Law, for the reason that that law is not retrospective and does not purport to cover transfers fully executed and under which title vested prior to its passage. In the consideration of this question it is necessary to advert to the differences in opinion between the District Judge and the Judges of the Circuit Court of Appeals.

Judge Sessions, in the opinion given at the conclusion of the argument in the District Court (Trans. 160-161), conceded that the transfer or creation of the trust was a transaction completed more than a year before the tax-law went into effect; that Mrs. Dickel reserved in the trust conveyance no right or control or possession or enjoyment of the trust fund or the income derived therefrom; that the title to the trust fund was vested absolutely in the trustee and the rights of the beneficiaries under the trust became fully vested at the time of the execution and delivery of the trust conveyance. He stated the contention of the plaintiff, that the tax in controversy was levied retrospectively upon the transfer made by Mrs. Dickel to the Detroit Trust Company prior to the enactment of the Federal Estate Tax Law of September 8, 1916, and said (Trans. 161):

“If the tax here in controversy was not imposed upon the transfer of the trust fund by Mrs. Dickel

to the Detroit Trust Company, then the argument advanced in behalf of plaintiff fails."

The District Judge (Trans. 161) then propounded the question:

"Was the tax involved in the controversy a tax upon that transfer?"

He then proceeded to consider sections 201, 202, 203 and 209 of the tax-law (Trans. 161-162), and reached the conclusion that the tax was not levied upon the transfer from Mrs. Dickel to the Detroit Trust Company, but solely (Trans. 162) "upon the transfer of the net estate existing and belonging to the decedent at the time of her death," and that the transfer made by Mrs. Dickel to the Detroit Trust Company was to be "*considered solely for the purpose of determining the measure and amount of the tax* and not for the purpose of determining the property upon the transfer of which the tax is to be laid."

In Division III of this brief we shall consider this interpretation of law by the trial court and shall submit that it is wholly without justification. Indeed, while the District Judge was obviously of opinion that a retrospective tax upon the transfer to the Detroit Trust Company was invalid and professed to uphold no tax upon that transfer, the effect of his ruling was to tax the estate for that transfer, and it was only by construing the law as retrospectively affecting the completed transfer made long prior to its passage that the exaction of \$56,548.41 was upheld in the trial court.

The Circuit Court of Appeals was obviously unwilling to follow the District Judge in this reasoning. That court held it unnecessary to consider the correctness of the construction thus put upon the act by the trial judge (Trans. 239), and specifically held that the Congress intended that the tax should apply to all transfers in con-

templation of death, whether made before or after the passage of the Act, provided the transferor's death occur after the Act took effect (Trans. 235). Thus there is a marked divergence of opinion between the District Court and the Circuit Court of Appeals relative to the true interpretation of the Act of Congress. We shall at this time submit the reasons why the Act of September 8, 1916 cannot be construed retrospectively so as to authorize a tax upon the transfer evidenced by the deed of trust of date April 21, 1915, and shall later consider the construction placed upon the Act of Congress by the trial judge and the Circuit Court of Appeals respectively.

The assignments of error upon which we rely in presenting the point argued in this division of our brief are as follows: the affirmance of the refusal of the trial court to direct a verdict for plaintiff (Trans. 165; assignment of error 40; Trans. 219, 262); the affirmance of the refusal to grant plaintiff's first, second and eleventh requests to charge (Trans. 156, 159, 170; assignments of error 41, 42 and 51; Trans. 220, 223, 263, 267); the affirmance of the charge to the jury in substance that the law authorized the taking into consideration of property which had been transferred absolutely prior to its passage, if such property had been transferred in contemplation of death (Trans. 166, 171; assignments of error 53 and 54; Trans. 224, 267-268); the affirmance of the denial of plaintiff's motion for new trial (Trans. 174, 176); assignment of error 64, Trans. 226, 270); and the holding that the Act was intended to reach absolute conveyances in contemplation of death made before its passage (assignment of Error, 66; Trans. 239, 270).

The sections of the Estate Tax Law of September 8, 1916, thus interpreted in the District Court and Circuit Court of Appeals are numbered 201, 202, 203 and 209 and

for convenience of the court we here set forth the material portions of those sections:

"Sec. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or non-resident of the United States: • • •

"Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

"(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.

"(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; and

"(c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent. • • •."

"Sec. 203. That for the purpose of the tax the value of the net estate shall be determined—

"(a) In the case of a resident, by deducting from

the value of the gross estate—

“(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; and

“(2) An exemption of \$50,000; * * *

“Sec. 209. That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration allowed by any court having jurisdiction thereof, shall be divested of such lien.

“If the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth) and if the tax in respect thereof is not paid when due, the transferee or trustee shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for a fair consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for a fair consideration in money or money's worth.”

In the interpretation of the above sections there are several principles of statutory construction to which we advert before discussing the words of the Act.

(a) *It is uniformly held that statutes imposing special*

taxes are to be liberally construed in favor of the taxpayer and against the Government.

Eidman vs. Martinez, 184 U. S. 778, 583.

McNally vs. Field (C. C.), 119 Fed. 445.

Blair vs. Herold (C. C.), 150 Fed. 199; (Affirmed in C. C. A. 158 Fed. 804).

Gould vs. Gould, 245 U. S. 151.

United States vs. Coulby, (C. C. A. 6) 258 Fed. 27.

Edwards vs. Wabash Ry. Co. (C. C. A. 2). 264 Fed. 610, 616.

United States vs. Field, 255 U. S. 257.

United States vs. Wigglesworth, 2 Story, 369, 373-374.

Matter of Will of Vassar, 127 N. Y. 1, 12.

Matter of Enston, 113 N. Y. 174, 178.

Matter of Fayerweather, 143 N. Y. 114, 119.

Matter of Harbeck, 161 N. Y. 211, 217.

In *Eidman vs. Martinez, supra*, the Supreme Court of the United States interpreted the Federal Estate Tax Law of 1898. Mr. Justice Brown, in the opinion of the Court, said (p. 583) :

“It is an old and familiar rule of the English Courts, applicable to all forms of taxation, and *particularly special* taxes, that the Sovereign is bound to express its intention to tax in clear and unambiguous language, and that a liberal construction be given to words of *exception* confining the operation of duty, Warrington vs. Furber, 8 East, 242, 247; Williams vs. Sanger, 10 East, 66, 69; Denn vs. Diamond, 4 B. & C. 243, 245; Tomkins vs. Ashby, 6 B. & C. 541; Doe vs. Smaith, 8 Bing. 146, 152; Wroughton vs. Turtle, 11 M. & W. 561, 567; Gurr vs. Seudds, 11 Exchq. 190, though the rule regarding *exemption* from general laws imposing taxes may be different. Cooley on Taxation, 146; In Matter of Enston, 113 N. Y. 174, 177.

“We have ourselves had repeated occasion to hold that the custom revenue laws should be liberally interpreted in favor of the importer, and that the

intent of Congress to impose or increase a tax upon imports should be expressed in clear and unambiguous language. *Hartranft vs. Wiegman*, 121 U. S. 609; *American Net & Twine Co. vs. Worthington*, 141 U. S. 468; *United States vs. Wigglesworth*, 2 Story, 369; *Powers vs. Barney*, 5 Blatchford, 202."

It will be noted that the above case, like the suit at bar, involved an estate or succession tax, and the same is treated as a "special tax," in respect of which the legislative intent must be expressed in clear and unambiguous language, or the tax will not be enforced. The ruling is the same in *Blair vs. Herold* (C. C.), 150 Fed. 199, 201, where District Judge Cross said:

"A succession tax is a *special tax* and an act intended to impose it must be construed most strongly against the Government, and a clear authority for the imposition of the tax must be found in the statute."

In *McNally vs. Field* (C. C.), 119 Fed. 445, 448, Circuit Judge Colt said:

"It may also be observed that a tax should not be imposed unless such purpose clearly appears. When a statute is susceptible of two constructions, and the intention of the legislature is in doubt, such doubt as a rule, should be resolved in favor of the taxpayer."

In *Gould vs. Gould*, 245 U. S. 151, Mr. Justice McReynolds states the rule thus:

"In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen."

We respectfully urge that in the suit at bar the act is fairly capable of no construction save that the tax is imposed only upon transfers made subsequent to the

passage of the Act. Even if this were not true, this interpretation is certainly quite as natural as one which would make the Act retrospective in character. If so, the doubt will be resolved in plaintiff's favor.

(b) *Likewise, it is a principle in the construction of taxing statutes that the law must not be so construed as to impose an unusual and unjust tax.*

In *United States vs. Goelet*, 232 U. S. 293, the court construed section 37 of the Tariff Act of 1909, imposing a tax on foreign built yachts. The section in terms applied to all yachts owned "by *any* citizen or citizens of the United States." The question for decision was whether it applied to a yacht owned by an American citizen domiciled abroad, and which had not been within the jurisdiction of the United States during any part of the period for which the tax was levied. For the Government it was argued that, as the tax was levied on any citizen using a foreign-built yacht and as *any* includes *all*, therefore the statute expressly embraced a citizen permanently residing or domiciled abroad. It was held, however, in an opinion by Chief Justice White, that such exertion of the taxing power was so unusual and exceptional that an intent to impose such tax would not be presumed unless clearly expressed.

If a tax is properly rated as unusual or exceptional because the person upon whose property it is imposed, although an American citizen, is domiciled abroad, it is more fitly to be rated as unusual and exceptional if sought to be imposed upon a transfer completely executed, and under which title has vested, prior to the enactment of the tax law.

We refer also to *Knowlton vs. Moore*, 178 U. S. 41, 77, where the court said with reference to federal inheritance taxation,

"Where a particular construction of the statute

will occasion great inconvenience or produce inequality or injustice, that view is to be avoided, if another and more reasonable interpretation is present in the statute."

(c) *In the absence of manifest intent of the Legislature to the contrary, the statute will be construed as prospective, not as retrospective, in character.*

This principal of statutory construction is uniformly upheld and is conclusive of the matter in issue.

United States vs. Heth, 3 Cranch, 399, 413.

United States vs. Burr, 159 U. S. 78.

United States vs. American Sugar Company, 202 U. S. 563, 577.

Union Pacific Railroad Co. vs. Snow, 231 U. S. 204, 213.

White vs. United States, 191 U. S. 545, 552.

Chew Heong vs. United States, 112 U. S. 536, 559.

Sohn vs. Waterson, 17 Wall. 596.

Murray vs. Gibson, 15 How. 421.

We know of no better statement of the principle than that expressed by Mr. Justice Patterson, in the leading case of *United States vs. Heth*, 3 Cranch, 398, 413:

"Words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied. This rule ought especially to be adhered to, when such a construction will alter the pre-existing situation of parties, or will affect or interfere with their antecedent rights, services, and remuneration; which is so obviously improper, that nothing ought to uphold and vindicate the interpretation, but the unequivocal and inflexible import of the terms, and the manifest intention of the legislature."

In *United States vs. Burr*, 159 U. S. 78, it appeared that the tariff act passed August 28, 1894, expressly taxed

imports on and after the first day of August, 1894. The Supreme Court of the United States, in spite of these express words, held that the Act did not apply to transactions completed when the Act became a law and that goods imported after August 1, 1894, and prior to August 28, 1894, were not taxable under the Act of August 28, 1894. In the opinion of Chief Justice Fuller it is said (pp. 82-83):

"It is conceded that the general rule is as stated in *United States vs. Heth*, 3 Cranch, 398, 413, that 'words in a statute ought not to have a retrospective application unless they are so clear, strong and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.' "

In *Union Pacific Railroad Company vs. Snow*, 231 U. S. 204, 213, it is said:

"Courts will not, as we have seen, enforce a literal interpretation when by doing so *antecedent rights* are affected or human conduct given a consequence it did not intend. Such a purpose the courts refuse to assign to the legislature unless compelled by language explicit and imperative. And we have pointed out that we are repelled from so doing by grave doubts of its legality as well as of its justice. These considerations need not be further expanded. Their strength has been pointed out and their sufficiency to prevail over a literal interpretation of a statute."

Especially will a legislative act not be construed to be retrospective when vested rights are thereby affected. *Auffm'ordt vs. Rasin*, 102 U. S. 620, is in point. There the rights of the parties were fixed before an amendatory Act of Congress was passed, an assignee in bankruptcy having acquired a vested right in certain securities or their value. Mr. Justice Miller, in the opinion of the court, said (p. 622):

"The legal obligation to return them or to pay him their value had been incurred by the defendants.

To hold that Congress intended by this amendatory statute to take away that right of action, is to hold that it intended by a retrospective statute to destroy a vested right of property or an existing right of action. If it be conceded that Congress could do this, the principle is too well established to need the citation of authorities, that no law will be construed to act retrospectively unless its language imperatively requires such a construction. * * * ; and we see no reason to believe that in making a new rule on that subject Congress intended to make it retrospective, for the purpose of destroying rights of property or rights of action which had become vested before the passage of the law."

We have already seen that in the instant cause the rights of the parties under the deed of trust became vested on the execution and delivery of that deed on April 22, 1915. The rights of claimants under that deed were vested free of all obligation to pay any tax upon the transfer *then made*. Yet if defendant is right in the position assumed by him, upon the passage of the Act of Congress seventeen months later, and the death of Mrs. Dickel then ensuing, the Detroit Trust Company, as transferee, became "*personally liable for such tax*" under Section 209 of the Act. Not only this, but under the same section the property so transferred, "to the extent of the decedent's interest therein at the time of such transfer," became "*subject to a like lien equal to the amount of such tax.*"

To the extent of the debt thus enforced or lien thus imposed (\$56,548.11 in amount), the vested rights of the transferee were, therefore, effectually destroyed. In subsequent division II of this brief we shall argue that under its constitutional powers the Congress could not lawfully work this destruction of vested rights. We here point out that no language of the Act in question "*imperatively requires*" that it be construed as destroy-

ing rights of property which had become vested before its passage.

(d) *The words "at any time" in Section 202 do not relate to a period prior to the passage of the Act.*

Section 202, in sub-paragraph (b) thereof, provides, as we have already seen, that the value of the gross estate of decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated * * *

"to the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust in contemplation of or intended to take effect in possession or enjoyment at or after his death * * *".

In the lower court it was urged by counsel for defendant that the words in Sec. 202 "of which decedent has at any time made a transfer" embrace *all* transfers theretofore made by decedent, and that the trust deed of April 21, 1915, was such a transfer and came within the purview of the Estate Tax Law. This view was adopted by the Circuit Court of Appeals. We respectfully insist that it is not a reasonable interpretation to be placed upon the words above quoted.

In the first place it is to be noted that the instrument of date April 21, 1915, is not an ordinary transfer. It is rather the creation of a trust. The Act does not specify trusts created "*at any time*", but specifies an interest "*with respect to which he (the decedent) has created a trust in contemplation of * * * death.*" Yet the language is construed by the court precisely as if the words "*at any time*" were inserted between the word "*has*" and the word "*created*" where they appear in this clause of the Act. If it be said that this trust deed is in itself a "transfer" and that the words "*at any time*" are found in the Act between the word "*has*" and

the words "made a transfer", it may be replied that these general terms cannot have been intended to embrace the case in hand, that is to say, where the decedent "has created a trust", otherwise no meaning at all is attributed to these last mentioned words and their use is mere surplusage. The familiar rule requires that the Act be so construed, if possible, as to give effect to every word thereof. Thus *Platt vs. Union Pacific R. R. Co.*, 99 U. S. 48, 58-59, approves the rule "that some meaning, if possible, must be given to every word in a statute, and that where a given construction would make a word redundant, it is reason for rejecting it."

See also *Louisville & Nashville R. R. Co. vs. Mottley* 219 U. S., 467, 475.

United States vs. Lexington Mill Co., 232 U. S., 399, 410.

Turning to Section 209 of the Act, it will be noted that the same phraseology is preserved. The language is "If the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of * * death." Throughout the Act, indeed, the Congress consistently speaks of a "transfer" "made" and of a "trust" "created" and carefully differentiates between the two, with the possible exception of the last sentence in subdivision (b) of Section 202 where the word "transfer" may, perhaps, be given a broader meaning and held to include the creation of trusts.

The counsel for the Government are, therefore, before the court urging that the Estate Tax Law be given a retroactive operation and, to maintain their position, they are compelled to urge, first, that by construction the court insert the words "at any time" between the word "has" and the words "created a trust" where the same occur in the first sentence of subdivision (b) of Section 202; and *second*, that, these words being thus supplied,

the Act be given a retroactive construction and made to embrace trusts created before the enactment of the law. And all this in the face of the rule repeatedly declared by this Court, that the words of a statute ought not to have a retrospective operation "unless they are so clear, strong and imperative, that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied."

But even if the words "at any time" can be thus supplied, or the word "transfer" be held to embrace the creation of a trust, notwithstanding the circumstance that other provision is made for trusts created by decedent, the natural and obvious interpretation of the Act is that it applies only to transfers made after its passage. If Congress had wished so to frame the law as to embrace transfers made prior to its enactment, thus striking down and destroying vested rights, it would have been easy for that body to employ the words "at any time *heretofore*", or to make it apply broadly to all transfers made or trusts created by the decedent "whether made or created before or after the passage of the Act," or by other appropriate words to make evident the intent of the legislative body that the Act be retroactive in character. But this the Congress did not do. If it be true that, according to fixed principles of law, the Act is to be construed as prospective in character, it will not be held to apply to any transfer made *prior to its passage*. It may, however, be interpreted as applying to transfers made *prior to the death* of decedent if made subsequent to the passage of the Act. The true interpretation, therefore, is that the transfers in contemplation of death which come within the purview of the Act are those, and those only, made after the passage of the Act.

Obviously this is the correct interpretation of the Act.

Otherwise it applies to all transfers in contemplation of death, whether made ten, twenty-five or fifty years before the passage of the Act. It is unreasonable, in our view, to impute such intent to Congress.

The District Judge in his charge to the jury did, however, impute such intent to Congress. He charged the jury as follows (Trans. 166):

“The law authorized the taking into consideration, in certain instances and under certain conditions, of property which had been transferred absolutely, *prior to the death of the person making the transfer* in arriving at the amount of the tax which was to be computed. Among the provisions of law was one which in substance authorized the taking into consideration by the Tax Collector, or the Commissioner of Internal Revenue in levying the tax, property which had been transferred without consideration, that is, a gift, *at any time prior to the death of the person making the transfer* provided that such transfer, when it was made, was made in contemplation of death.”

This instruction plainly gave the jury to understand that the Act embraced *all* transfers made in contemplation of death, even though made many years prior to the passage of the Act. Assignments of error 53 and 54 are based on this instruction (Trans. 224, 267-268), and require the reversal of this case unless it can be held that Congress intended by this Act to tax transfers in contemplation of death, even though made a half century prior to the passage of the Act, if the grantor did not die until after the passage thereof.

The Circuit Court of Appeals appreciated that the interpretation claimed by us must be upheld or that, in the alternative, the statute must be held to embrace within its language all transfers made in contemplation of death, even though made long before the passage of the Act. Upon this point it is said in the opinion of that court (Trans. 237):

"It is true that if the tax before us is retroactive it might, at least theoretically, affect conveyances made many years before a grantor's death, but this consideration is hardly practical. Congress would, we think, scarcely be impressed with a practical likelihood that a transfer made many years before a grantor's death (say 25 years, to use plaintiff's suggestion) would be judicially found to be made in contemplation of death under the legal definition applicable thereto, and without the aid of the two years *prima facie* provision."

If we correctly understand this reasoning, it implies that the Congress intended to embrace within the purview of the Act all conveyances made in contemplation of death, even though made twenty-five years before the passage of the Act, but that the Congress was, nevertheless, "impressed with a practical likelihood" that the issue in such case would be resolved by the jury against the Government. With all deference we submit that it is a somewhat absurd interpretation of the statute which thus unnecessarily imputes to the Congress of the United States the intent to enact a revenue law imposing a tax which it believed to be impossible for the Government officials to collect. The court below arrived at this result through adherence to the supposed letter of the law at the sacrifice of its spirit. It is a case where, as St. Paul says, "The letter killeth, but the spirit giveth life."

The true rule is stated by Mr. Justice Field in *United States vs. Kirby*, 7 Wall. 482, 486-487:

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or absurd consequences. It will always, therefore, be presumed that the Legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.

"The common sense of man approves the judg-

ment mentioned by Puffendorf, that the Bolognian law which enacted, 'that whoever drew blood in the streets should be punished with the utmost severity', did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—'for he is not to be hanged because he will not stay to be burnt'."

It may be said that the terms of the Act limit the transfers embraced within its terms to those made within a period of two years prior to the death. But this is not correct, and neither the instructions of the District Judge (Trans. 166, 168), nor the ruling of the Circuit Court of Appeals (Trans. 234-237) are consistent with the existence of any such limitation. If the transfer is of "a material part" of decedent's property; if it is "in the nature of a final disposition or distribution thereof;" and if it is made "within two years prior to his death," without consideration, it is not even then declared to be made "in contemplation of death." The Act merely declares that "*unless shown to the contrary*" it shall in such case be deemed to have been made in contemplation of death.

In other words, if all the conditions above recited exist, the burden of proof is shifted, and there is raised, by the terms of the law, a presumption that the transfer is made in contemplation of death. But this is a presumption merely and may be rebutted. This cannot be made clearer than by the express words that the "*contrary*" may be "*shown*." The Act takes effect at its passage. It contains no words showing an intent to embrace within its terms transfers made prior thereto. Under this phraseology all transfers of a material part

of the property of decedent, in the nature of a final disposition or distribution thereof, made by him *after* the passage of the Act, and within two years prior to his death, if without consideration, are presumptively brought within the terms of the law. But if made *prior* to the passage of the Act, they do not come within its terms, for the reason that it does not embrace any transfer made before its enactment.

The opinion of the Circuit Court of Appeals (Trans. 235) rejects this reasoning. That Court refers to the circumstance that Section 201 imposes a tax upon the transfer of the net estate of "*every* person dying after the passage of this Act"; and that in Section 202 the taxable estate of decedent embraces all transfers of the two classes mentioned which the decedent has "*at any time* made." The court then quotes from Section 202 (b) the following:

"Any transfer of a material part of his property in the nature of a final disposition or distribution thereof made by the decedent *within two years prior* to his death without such a consideration (a fair consideration in money or money's worth) shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

The italics are the court's and the opinion remarks:

"The italicized words in each of the above quotations indicate, on their face, an all-embracing intent, and are thus *prima facie* opposed to a limitation to transfers made after the passage of the act."

This holding of the Circuit Court of Appeals is precisely in conflict with the decision of this court in *United States vs. Goellet*, 232 U. S. 293, 297, cited in subdivision (b) *supra*. The Tariff Act there in question taxed the use of foreign built yachts, and, as we have seen, imposed the tax upon all yachts owned "*by any* citizen or citizens of the United States." It was insisted by the

Government that the act imposed the tax upon the use of yachts owned by citizens of the United States domiciled and residing abroad, and in support of this contention, it was argued that "as the tax is levied on *any* citizen using a foreign built yacht and as *any* includes *all*, therefore the statute expressly embraces a citizen permanently domiciled and residing abroad." This is the identical argument of "an all-embracing intent" made by the Circuit Court of Appeals in the instant cause (Trans. 235). It was founded upon the contention that "*any*" citizen or citizens included "*all*" citizens, and hence a citizen domiciled or residing abroad, just as in the suit at bar, it is argued that "*any*" time means "*all*" time, and hence includes time prior to the enactment of the law. That argument did not meet the approval of this court, however, Chief Justice White saying, in the opinion (232 U. S. 297) that

"this argument in effect begs the question for decision which is whether the use of the words, *any citizen*, without more, should be considered as expressing more than the general rule of taxation, or in other words can be treated without the expression of more as embracing the exceptional exercise of the power to tax one permanently residing abroad."

It was conceded in the opinion of this court in the Goelet case that Congress had power to impose the excise duty there in question on a citizen owning a foreign-built yacht, even though domiciled abroad, but the interpretation placed upon the Act was that Congress had not exercised this power, the general terms employed not sufficing to embrace that unusual case. In other words the general terms employed did not indicate "an all-embracing intent". By a parity of reasoning, the words "at *any time*" in the Act now under review are not to be construed as meaning "all time". So to declare is to construe the Act as authorizing an exceptional

exercise of the power to tax. The words are to be interpreted rather as relating to the period embraced in the Act; that is to say, as meaning *any time* after the taxing act became effective, not as referring to a time when that Act had no existence.

(e) *The correctness of the interpretation which we urge is shown by the later Revenue Acts.*

We call attention to the Revenue Act of 1918. Sec. 402 of that Act, so far as material, is identical with Sec. 202 of the Act of September 8, 1916, with the exception of the added words in parenthesis italicized in the following quotation:

"Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated— • • •

"(e) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust in contemplation of or intended to take effect in possession or enjoyment at or after his death (*whether such transfer or trust is made or created before or after the passage of this Act*), except in case of a *bona fide* sale for a fair consideration in money or money's worth. Any transfer of a material part of his property, in the nature of a final disposition or distribution thereof, made by a decedent within two years prior to his death, without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death, within the meaning of this title."

Section 402 of the Revenue Act of 1921 is identical with the same section in the Act of 1918, as above quoted. By adding the words in parentheses above italicized, Congress incorporated *verbatim* in its Revenue Laws identical provisions of the laws of New York and other States. The words of the New York statute which Con-

gress thus carefully refrained from incorporating in the Act of Sept. 8, 1916, are "by any such transfer, *whether made before or after the passage of this chapter.*" (See Birdseye, Cumming & Gilbert's Consolidated Laws of New York, 1st Ed. (1909), Vol. 5, page 5978). In various other State statutes the words are practically identical, viz.: "by any such transfer, *whether made before or after the passage of this Act.*"

Colorado: Session Laws of 1913, Chapter 136, Section 1-D.

Jones and Addington: Annotated Statutes of the State of Illinois, Edition of 1913, Vol. 5, p. 5646, par. 9597, Sec. 1 (3).

Burns Annotated Indiana Statutes, Revision of 1914, Vol. 4, p. 924, Sec. 10143 a (5).

Michigan: Compiled Laws (1915), Vol. 3, Sec. 14524.

Minnesota: General Statutes (1913), Sec. 2271 (4).

Rhode Island: Laws of 1916, Chap. 1339, Sec. 1, par. 5 (2), Effective Feb. 22, 1916.

South Dakota: Compiled Laws of 1913, Vol. 1, p. 549, 14½, Sec. 1 (4).

These provisions the Congress carefully refrained from incorporating in the Act of September 8, 1916, although they existed in the State statutes largely copied into the Congressional enactment. With reference thereto we observe:

First.—The omission of these words from the Act of September 8, 1916, showed that the Congress did not intend that act to be retrospective in character and cover transfers made prior to its enactment. This intent would be clear if the case stood merely upon the fact that the words above italicized, and which are embraced in the statutes of New York and some other States, were omitted

when the Congress adopted, as and for its own, the main provisions of those State statutes.

Second.—That intent is accentuated when it appears that the words above italicized were incorporated in the Revenue Acts of 1918 and 1921, for the obvious reason that the Congress deemed it necessary so to do, in order to give the acts, in some measure, a retrospective operation. It was practically a declaration by the Congress that it knew that the provisions theretofore existing, relative to transfers in contemplation of death, were *not* retrospective in character, but that it would insert words which would make them so.

The Circuit Court of Appeals concluded, however, (Trans. 239), that the amendment of 1918 was made to elucidate without changing the law, and put at rest any controversy on the subject. As to this we observe that, if there be any reasonable controversy as to whether the Act is retrospective in character, it cannot be construed to be so, it being the well settled rule of this court that the words in a statute will not be given a retrospective operation "unless they are so clear, strong and imperative, that *no* other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied." See subdivision (c) *supra*.

United States vs. Field, 255 U. S. 257, upholds our contention. That case involved the right of the Government to impose an estate tax on property passing under a general power of appointment exercised by a decedent. The Revenue Act of Sept. 8, 1916, contained no express provision that property passing under a general power of appointment exercised by decedent be included as a portion of his gross estate. The Act of 1918 did contain such express provision. Mr. Justice Pitney, in the opinion of the court, said:

"It would have been easy for Congress to express

a purpose to tax property passing under a general power of appointment exercised by a decedent had such a purpose existed; and none was expressed in the Act under consideration. In that of February 27, 1919, which took its place, the section providing how the value of the gross estate of the decedent shall be determined contains a clause precisely to the point. * * * *Its insertion indicates that Congress at least was doubtful whether the previous Act included property passing by appointment.*"

We see no escape from the application to the instant cause of the principle thus enunciated. The Act of Sept. 8, 1916, contained no expression of purpose to impose a tax upon transfers made prior to its passage. It would have been easy for Congress to express such purpose had it existed. In the Act of 1918, which took the place of the former statute, there was a statement of the express purpose that the Act apply to transfers made before its passage. The insertion of these words indicates that Congress at least was doubtful whether the previous Act included transfers made prior to its passage. If the intent of Congress is doubtful, it follows that the Act cannot be construed to be retrospective in character.

The rule declared in *United States vs. Field* is supported by many adjudged cases. It is well settled that the passage of an amendment or new statute, after the case has arisen, expressly covering the question of taxability in dispute under the earlier Act, is fair evidence that the Legislature by the prior Act did not intend to include the case under such prior statutes. Well considered cases have applied this rule under Inheritance Tax Laws.

Matter of Miller, 110 N. Y. 216, 223.

Matter of Enston, 113 N. Y. 174, 183.

Matter of Harbeck, 161 N. Y. 211, 217-218.

See also *United States vs. Bashaw* (C. C. A. 8),
50 Fed. 749, 753-754.

United States vs. Woodruff (C. C. A 2), 175 Fed. 776.

To the same effect is *Ebersole vs. McGrath* (D. C.), 271 Fed. 995, 1001, where the same question was presented relative to the right to tax a transfer under power of appointment as in *United States vs. Field*. District Judge Peck said:

"It is urged by the Government that the subsequent amendment of February 24, 1919, (Chapter 18, §402, Comp. Stat. §6336 3/4 c), subjecting the appointment to the tax, must be considered as declaratory and explanatory of the prior act. But this would seem to be no more than an admission of doubt as to the former intention of Congress, and of that doubt the citizen sought to be taxed is entitled to the benefit. And furthermore the inference would be rather than the former act was insufficient."

Third.—These italicized words were inserted by the Congress in Section 402 of the Revenue Act of 1918, and in the like section of the Revenue Act of 1921, through evident fear that, if the words of the old law were re-enacted without change, the later Acts would also be held to be prospective only, and hence that transfers made in contemplation of death, *after the enactment of the statute of Sept. 8, 1916, and prior to the enactment of the later Revenue Act or Acts*, would wholly escape taxation. It is doubtless true that, in the absence of the italicized words, such would have been the result of the new Acts, for Sec. 401 of the Revenue Act of 1918 declares that the estate taxes thereby imposed are in lieu of the estate taxes imposed by the Revenue Acts of 1916 and 1917, and the same section of the Revenue Act of 1921 contains the same statement with reference to the Revenue Act of 1918.

(f) *Nothing in the Act of Sept. 8, 1916, discloses the intent of Congress to tax completed transfers.*

We have already shown that the general terms of the Act in question do not indicate the intention of Congress to levy a retroactive tax on transfers, and that the later Revenue Laws confirm the conclusion that no such intention existed. We now proceed to consider additional reasons assigned in the court below for construing this Act as retrospective in character.

In the opinion of the Circuit Court of Appeals it is said that the evident theory of the statute is that transfers intended to take effect after the death of the grantor as well as those made in contemplation of death, are are testamentary in character. The court then cites *Wright vs. Blakeslee*, 101 U. S. 174, 176, to the effect that a transfer intended to take effect in possession or enjoyment after the grantor's death would under this statute be taxable, although made before the passage of the Act; and from this it is concluded that transfers made prior to the passage of the Act in contemplation of death are likewise intended to be taxed (Trans. 235-236). The case of *Wright vs. Blakeslee* will be further considered in division II of this brief, as bearing upon the constitutionality of an act taxing transfers already vested. We now remark merely that it has no bearing upon the question whether the Act now under consideration was intended to be prospective or retrospective in character. The remainder there in question was contingent and did not take effect until after the passage of the Act, when a life estate fell in, and the case there under review was held to be within the terms of the statute because, up to the moment of the life tenant's death, "her children had no interest in the land except a bare contingent remainder expectant upon her death and

their surviving her" (101 U. S. 177). The Act there in question was, therefore, given only a prospective operation, but the case then in hand was held to be embraced within its terms as thus construed.

The suggestion is made by the Circuit Court of Appeals (Trans. 236) that it is not unnatural or necessarily unjust that one taking a conveyance in contemplation of the death of the grantor, although taking it tax-free at the time, "should do so at the risk of having the transfer taxed, directly or indirectly", at a later date. This suggestion, however, relates to the *power* to impose such a tax, and is far from upholding the argument, in the course of which it is made, that an Act which is not expressly given retroactive operation should be given such operation inferentially or by mere implication.

The same is true of the further suggestion (Trans. 236) that, under this statute, the remaining estate of decedent is made primarily liable for the tax, and that it is only when such estate proves insufficient for the purpose that resort may be had, under Section 209, to the personal responsibility of the transferee or to the property transferred. As will be seen when we come to consider the constitutionality of the law, if the transfer made prior to the passage of the Act, embraced *all* the property of the grantor, there would be no other estate out of which it could be satisfied, and the suggestion made by the Court of Appeals imputes to Congress the intent to give the law a retroactive operation to impose the tax upon such prior transfer, despite the fact that the statute does not so declare.

It is said in the opinion of the Circuit Court of Appeals that Congress has not been averse to imposing taxation for a period preceding the passage of the taxing act; that this has been the ordinary practice with respect to income taxes; that the Revenue Acts of 1916 and 1918

were made retroactive until January 1, 1916, and 1918 respectively; and these statements are made in support of the argument that Congress intended the Estate Tax Law of Sept. 8, 1916, to be given retroactive operation (Trans. 236-237). When we come to consider the question of the validity of retroactive clauses, we shall advert to the difference between an income tax and an excise tax upon the act of Mrs. Dickel in executing the deed of trust to Detroit Trust Company. We now merely remark that the suggestions made by the Court of Appeals in this particular bear, if at all, only upon the *power* of the Congress to impose retroactive taxation; and that, when the Congress desired to make retroactive the Income Tax Laws of 1916 and 1918, it expressly declared that they were thus made retroactive and that they were made effective as of the first days of January in each of the years 1916 and 1918. The legitimate conclusion is, therefore, that, if it had been desired by the Congress that the Estate Tax Law of Sept. 8, 1916, be given retroactive operation, express declaration of its intent in that regard would likewise have been made in that case, as in the case of the Income Tax Laws.

(g) *Treasury Decision No. 2385.*

The Commissioner of Internal Revenue has gone to the extent of ruling, in Treasury Decision No. 2385, that the words of the statute "has at any time made a transfer" are to be interpreted as embracing "transfers of any kind made in contemplation of death *at any time whatsoever* prior to September 8, 1916." The sole test of tax liability, he declares, is "the date of the death of the decedent."

This Treasury Decision is important because it shows that, if the judgment in this cause is affirmed, the Government will not only have the right but *intends* to

tax transfers even though made at a great period of time, 25 or 50 years perhaps, prior to the enactment of the law. This intent of the Treasury Department is scarcely in harmony with the suggestion of the Circuit Court of Appeals (Trans. 237) that there is a "practical likelihood" that the Act will be nullified as respects transfers made long prior to its passage because such transfers will not be avoided by court or jury. It accentuates the necessity of putting upon the Act a reasonable construction to avoid bringing within its purview numerous and unjust claims in behalf of the Government, which, we believe, were never within the contemplation of the Congress in passing the law.

(h) *The Estate Tax Law of 1916, so far as relates to gifts in contemplation of death, adopted the provisions of State statutes, which had been held not retrospective in character.*

The provision of the Estate Tax Law of 1916 relative to gifts "in contemplation of death", as well also as the provision relative to gifts "intended to take effect in possession or enjoyment at or after his death", was adopted from State statutes. This subject will be further adverted to when we proceed to consider, as we do in division IV of this brief, the history and meaning of the phrase "in contemplation of death". We shall in this division refer to various State decisions interpreting this phrase, which decisions had become part of the laws of such States prior to the passage of the Federal Estate Tax Act. In such situation it is clear that the Congress adopted this phrase with the interpretation already placed on it by the State courts. This is clearly brought out in the case of *Blair vs. Herold*, (C. C.), 150 Fed. 199, (affirmed C. C. A., 158 Fed. 804). In that case the court considered the interpretation of the

provision in the Federal Inheritance Tax Law of 1898 concerning personal property "transferred by deed, grant, bargain, sale or gift made or intended to take effect in possession or enjoyment at or after the death of the grantor or bargainor." One of the questions in the case was whether or not the above statute applied solely to gifts or to deeds made upon adequate consideration. District Judge Cross held that the statute applied only to gifts, basing his decision upon New York, Illinois and Ohio cases interpreting similar words in the statutes of those States. He said (p. 203):

"It thus appears that the courts of three different states at least construed language identical or similar to that in question as meaning transfers without consideration, and that the Supreme Court of the United States has intimated a similar construction. Furthermore, some of these decisions were rendered just prior to the passage of the Revenue Act of 1898. It must therefore be presumed that its framers were familiar with such interpretation and that the statute was passed with reference thereto. This is the presumption of law."

Judge Cross' decision respecting the applicability of decisions of State Courts is upheld in *Willis vs. Eastern Trust Co.*, 169 U. S. 295, 307-308; *Capital Traction Co. vs. Hof*, 174 U. S. 1, 36.

In the light of these decisions, and of the fact that the Federal Estate Tax Law relating to gifts "in contemplation of death" was adopted from State statutes, we shall make reference to the decisions of various State courts.

The Circuit Court of Appeals, in its consideration of the question whether the Act was intended to apply to transfers made before its passage (Trans. 234-237), did not advert to the interpretation placed by the State courts upon the State statutes whose phraseology was

adopted by Congress. The point is of controlling importance. We, therefore, purpose to show that Estate Tax Laws existing in various States of the Union were construed by the courts of those States to be prospective in character and to have no retrospective operation, and that these statutes are practically identical with the Federal Estate Tax Law thereafter adopted. We, therefore, respectfully insist that Congress adopted, with this statute, the construction which it had theretofore received.

In support of our contention that the statute is not retrospective, we cite:

Lacey vs. State Treasurer, 152 Ia. 477.

State vs. Probate Court of Washington County,
102 Minn. 268.

In Re Hendricks' Estate, 3 N. Y. S. 281.

In Re Webber, 136 N. Y. S. 83.

Commonwealth vs. McCauley, 166 Ky. 451.

In Re Edgerton's Estate, 54 N. Y. S. 700. (Affirmed on opinion below, 158 N. Y. 671.)

In Re Meserole's Estate, 162 N. Y. S. 414.

In Re Meehan's Estate, 166 N. Y. S. 623.

Lacey vs. State Treasurer, 152 Ia. 477, construes the Iowa Inheritance Tax Law of 1896. That law, like the Federal Estate Tax Law, taxed deeds and gifts "made or intended to take effect in possession or enjoyment after the death of the grantor or donor." In 1892 John Smith received certain property, as devisee under a will. In order to avoid a will contest he executed an agreement to keep the property for his own life only, the property then to go to certain of the contestants. Smith died in 1906, and an endeavor was made to tax these remainders which took effect in possession and enjoyment upon his death. Judge McClain delivered, for the

court, a strong and well considered opinion, in which he held that the remianders were vested, although they were subject to be divested in part upon certain conditions. The court also held that the Inheritance Tax Law was not retroactive. On page 483 it is said:

"If the right to the property passed by the conveyance *beyond the control of the grantor*, it was a vested right; it was not a mere expectancy, like the prospective right of an heir, or the inchoate right of a wife, and it was not therefore subject to burdens which the Legislature might attempt to impose by retrospective laws. Cooley, Constitutional Limitations (7th Ed.) 508, 528.

"Specifically, it has been held without any apparent conflict in the authorities that an interest in property created by will or deed *in the nature of a remainder* becomes a *vested interest from the time the will or deed takes effect*, and that a subsequent collateral inheritance tax statute has no application to it. * * * Even though the remainder is so far conditional that it may have to be opened up to let in afterborn children, and on the other hand, may be divested by death without issue of the person named, nevertheless, it constitutes a vested interest not subject to a subsequent collateral inheritance tax statute, passed before the termination of the life estate."

Tested by the rule here laid down, the Act of September 8, 1916, has no application to the trust deed of April 21, 1915, made by Mrs. Dickel (Trans. 179-188). The cause at bar is much stronger for the tax-payer than Lacey vs. State Treasurer. There the remainder only passed beyond the control of the grantor before the enactment of the taxing statute, a life estate being reserved. Here no life estate was reserved and the entire interest in the property passed "*beyond the control of the grantor*" when the trust deed was made. The interests conveyed were vested from the time the deed took effect and hence the Estate Tax Law subsequently enacted has no appli-

cation thereto. Judge Sessions conceded that the transfer made by Mrs Dickel was absolute and that she reserved no control or interest whatsoever. (Trans. 163, 164, 167); and the Court of Appeals seems to have been of the same opinion (Trans. 234).

State vs. Probate Court of Washington Co., supra, is illuminating upon the point here under discussion. On January 8, 1903, David Tozer, then 79 years old and the owner of a large amount of property, organized a corporation and conveyed all his property except his homestead and personal effects, to the corporation, and took back all but four shares of the corporate stock. His wife joined in the conveyance on his agreement to assign one-third of the stock to her and the remaining two-thirds to their children. This he did, and the children leased their stock back to him for life. His wife then assigned her stock to the children and they leased it back to her for life. There was, in Minnesota, in 1903, an inheritance tax law which was afterwards held unconstitutional. In 1905 a valid inheritance tax law was enacted, and thereafter, in 1905, David Tozer died. It was held that his property was not taxable thereunder. The court said (p. 285):

"We are urged to consider seriously the evils which would result should this court set the seal of its approval upon the transaction in question, and thus permit a great property to escape the payment of the inheritance tax. But we do not consider that the success and efficiency of the inheritance tax law is involved in this case. *That law is prospective in its operation, and it is beyond the power of the state, even if so desired, to subject to its operation property which the owner in good faith disposed of before his death.* In re Seaman, 147 N. Y. 69; In re Craig, 89 N. Y. S. 971, 181 N. Y. 551; In re Pell, 171 N. Y. 48; In re Hendricks, 3 N. Y. S. 281; In re Hitchin's Estate 89 N. Y. S. 472; 181 N. Y. 553. The State has not by its legislation attempted to do so."

(P. 286):

"It is possible that David Tozer and the members of his family at the time of these transactions may have had the possibilities of an inheritance tax in mind; but the law which the state is now attempting to apply was not then in force, and was not enacted until two years and more thereafter. *The case, therefore, does not present the question of the effect of a transfer of property with the intention and for the purpose of avoiding the operation of an existing inheritance tax law.*"

(P. 290):

"Looking at the transaction as a whole, it is evident that it constituted a contract or a number of contracts between David Tozer, his wife and children, in the nature of a family settlement. Such arrangements, which tend to the peace and security of the family, and avoid disputes and litigation, have always been favored by the law, and upheld without other consideration, and without much regard to technicalities."

In Re Webber, 136 N. Y. S. 83, was a case in which Martha A. Webber, in August 1909, made a trust deed, reserving the income to herself and giving to certain others interest after her death. There was then an inheritance tax law in effect, but another was passed in July 1910, increasing the rates of taxation. Martha A. Webber died in October 1910. The gift was held taxable under the law existing in 1909, and not under the law of 1910.

The court said (p. 85):

"We are clearly of the opinion that the learned surrogate has properly disposed of this question. When the trust deed was made and delivered, without reserving any right to change the same, the right of succession became fixed, and it is this right of succession, and not the property, which is the subject of the tax. * * * The law in effect at the time that the right of succession became fixed is the law which governs in a case like this and the question as to when the beneficiaries actually come into the en-

joyment of the fund is of no consequence. The beneficiaries under the trust deed took their rights as of the day of the delivery of the deed. Their rights were fully established subject to the contingencies provided therein, and those who should finally take became entitled thereto upon the payment of the tax provided for the transfer at the date of the delivery of the deed, and there can be no justification for construing Chapter 706 of the Laws of 1910 to relate back to this transfer and to fix the tax therefor. The fact that the deed was made in contemplation of death, if this be true, operates of course to give a right of taxation upon the succession, but it does not operate to make this deed in effect a will to become operative on the death of Martha A. Webber. *The deed became operative immediately upon its delivery, with the intention of vesting title in the trustees for the purpose of the trust, which provided for the final distribution of the property, and only the beneficiaries were postponed to the happening of a particular event, and the law of that contract must be determined by the law as it existed when the deed became effective."*

It will be noted that the case last above cited was one in which a life estate was reserved to the creator of the trust. Nevertheless, a retroactive tax was not imposed.

The case of *Commonwealth vs. McCauley*, 166 Ky. 451, is squarely in point. In that case the State of Kentucky passed an inheritance tax law on June 13, 1906, taxing inheritances and property "which shall be transferred by deed, grant, sale or gift made in contemplation of the death of the grantor or bargainor, or intended to take effect in possession or enjoyment after such death." In 1895 Winnifred McCauley deeded property subject to a life interest to herself, with power of revocation, the deed being made to P. M. J. Rock. She never revoked it, and died upon October 20, 1906, leaving all her

property to P. M. J. Rock. The court held that the deed was not taxable under the law of June 13, 1906, saying (p. 453):

“It is the manifest meaning of this language of the act that the inheritance tax is to be imposed as to property that may become subject thereto after the act becomes effective. The act, therefor, cannot be given a retroactive effect. This case seems to have been settled in *Winn vs. Schenck*, 33 Ky. 615, 110 S. W. 827.”

The like construction was placed on the Inheritance Tax Law enacted by the Congress of the United States during the Civil War.

Folsom vs. United States, 21 Fed. 37, holds that the estate of a person who, at the time of the passage of the Act of Congress of June 30, 1864, had already become entitled to and invested with an estate in fee in certain lands, subject to his father's life-estate, did not come within the operation of that act. The decision was by Circuit Judge Wallace, who said:

“A retroactive operation is not to be given by construction, so as to subject persons to a tax upon interests they may have acquired years before the law was passed.”

A similar construction was placed upon the Federal Estate Tax Law of 1898 passed at the time of the Spanish American War. This law also has been held by the courts to have no retrospective operation.

Blair vs. Herold, (C. C.), 150 Fed. 199.

Same case, (C. C. A.), 158 Fed. 804.

McClain vs. Pennsylvania Co., etc., (C. C. A.), 108 Fed. 618.

In *McClain vs. Pennsylvania Co., etc.*, *supra*, it appeared that testator died in 1889, leaving property in trust, which trust became distributable to those in re-

mainder on April 11, 1899. Circuit Judge Dallas delivered the opinion of the court, holding that the statute was not intended to cover gifts made prior to its passage, in which opinion he was fortified (p. 620) by the fact that the War Revenue Act of 1864 contained similar language and

“had been officially administered in accordance with our understanding of the effect of that language, and this established construction of it must have been presumed to have been known to Congress when it again used the same language in the Act of 1898.”

Blair vs. Herold, 150 Fed. 100 (affirmed 158 Fed. 804, C. C. A.). In this case the Federal Inheritance Tax Law of 1898 was again under consideration. A tax had been imposed upon a partnership interest which, upon the death of the owner in 1899, passed to his son. This passing to his son, however, was in accordance with a partnership agreement, by means of which agreement the father gave to his son, upon certain conditions, his share in the partnership upon his death. District Judge Cross said (p. 201):

“It will be noticed that the partnership agreement was entered into 8 years before the passage of the war revenue act. *Consequently no claim can be made that it involved any intention to evade the provisions of that act.*”

Judge Cross based his decision in part on the fact that there was consideration for the partnership agreement, but also upon the fact that the gift in the partnership agreement was prior to 1898, and the interest in remainder therein was vested prior to 1898 (citing *Matter of Craig*, 89 N. Y. S. 971, 181 N. Y. 551; *Matter of Pell*, 171 N. Y. 48; *Matter of Vanderbilt*, 172 N. Y. 69. 73).

The court said (p. 207):

“In the case at bar, I think the plaintiff's rights accrued at once the partnership agreement was en-

tered into. They were absolute and irrevocable, so far as the parties were concerned and were contingent only upon the happening of an event which did happen. The case appears to me to be within the principle laid down by the above authorities."

In the instant cause, where the gift was not contingent upon the death of Mrs. Augusta Dickel, but was absolute from the start, it seems to be clear, *a fortiori*, that the statute is not retroactive and does not apply thereto.

Many cases are found in the books in which, more readily than in the instant cause, the courts might have construed inheritance tax laws to be retroactive in character. Yet they have declined to do so. So to construe such laws almost inevitably results in injustice which the courts are studious to avoid. Their attitude was well expressed by Mr. Justice Holmes, in *Hooper vs. Shaw*, 176 Mass. 190, 191:

"State inheritance tax laws are apt to aim at seizing all that they can get without regard to consistency of principle, but when it is possible to interpret them to mean what is just, we must do so."

In the cause at bar it is not the Congress which has aimed at seizing all it can get. We find in the Legislative Act no intent to make it retroactive. The difficulty arises rather because the Treasury Department, aiming to "seize all it can get," has placed upon the Act of Congress a forced and unnatural construction which it does not properly bear.

Among the numerous additional cases which hold that Inheritance Tax Laws are not so to be construed as to be given retrospective operation, we cite, without further comment:

Miller vs. McLaughlin, 141 Mich. 425, 432-433.
In Re Horler's Estate, 161 N. Y. S. 957.

Matter of Langdon, 153 N. Y. 6.

In Re Ripley's Estate, 106 N. Y. S. 844. (Affirmed on opinion below, 192 N. Y. 536).

Matter of Harbeck, 161 N. Y. 211.

In Re Smith, 135 N. Y. S. 240.

In Re Haggerty, 112 N. Y. S. 1017. (Affirmed on opinion below, 194 N. Y. 550).

In Re Chapman, 117 N. Y. S. 679. (Affirmed on opinion below, 196 N. Y. 561).

Commonwealth vs. Wellford, 114 Va. 372.

Emmons vs. Shaw, 171 Mass. 410.

State vs. Safe Deposit & Trust Co., 132 Md. 251.

In fact with the exception of the decisions in the instant cause, we know of no court which has construed an inheritance tax law in such manner as to operate retrospectively upon prior vested transfers.

(i) *The purpose of the law.*

The purpose of the provision placing a tax upon transfers made in contemplation of death, or intended to take effect in possession or enjoyment at or after death, is obvious. It is placed in the Act in order that persons may not avoid the law imposing estate taxes and thereby defraud the Government out of the tax. That this is the purpose of the provision appears in some of the cases above cited.

This purpose is made the more apparent upon turning to the Congressional Record. The bill was favorably reported to the House of Representatives by Congressman Kitchin, the author of the bill and chairman of the Committee on Ways and Means. Mr. Kitchin was asked concerning the meaning of the provision regarding transfers made in contemplation of death (See Vol. 53, Cong. Rec. p. 10729), whereupon he made the following remark:

"I will say that two-thirds of the States that have an inheritance tax have substantially similar provisions, and if we did not have that provision in, the gentlemen can see *what great fraud could be perpetrated upon the estate tax law.*"

"Mr. Elston: I have read the section. I say that it clouds *every title that is transferred after the passage of this act.*"

Mr. Kitchin then insisted that the provision was just like that in the State laws, and did not contradict Mr. Elston's statement that it applied to titles transferred after the passage of the act.

The transfer in the instant cause does not come within the purpose of the Act. Augusta Dickel had no desire to escape the Federal Estate Tax Law, nor to defraud the Government of any tax justly due. When she made the transfer, in April, 1915, not only was there no Federal Estate Tax Law upon the statute books, but the bill imposing the tax had not even been introduced in Congress. It was not introduced in that body until July 1, 1916, more than a year and two months after the creation of the trust.

53 Congressional Record, p. 10372.

The law was finally approved on September 8, 1916, eight days before Mrs. Dickel's death. (Trans. 166.) She doubtless died in ignorance of the existence of any such law. Be that as it may, it is clear that she could not have had in mind any estate tax law when the trust was created, and that the trust did not deprive the United States of any tax whatsoever, and was not designed so to do.

Although this was apparent, nevertheless, Judge Sessions refused so to charge the jury (Trans. 157, 170; Assignment of Error 46, Trans. 221); and this refusal the Court of appeals declined to overrule (Trans. 264).

(j) *Tax payable by Executor.*

Another strong reason why the Federal Estate Tax Law should not be construed to be retroactive is that it expressly provides, in Secs. 207, 208 and 209, that the tax is to be paid by the executor out of the estate. In other words, the tax comes from the residuary estate unless the testator in some manner provides for a *pro rata* decrease of specific or money bequests. This being so, after the law is in existence and the testator is advised of its provisions, he can place the burden of the tax upon all bequests if he so desires, or place it entirely upon his residuary estate. This was expressly in view at the time the Act was being considered in Congress.

Mr. Hull of Tennessee, speaking in favor of the proposed law, in behalf of the Ways and Means Committee, said (Vol. 53, Cong. Rec., p. 10657):

“Under the general laws of descent, the proposed estate tax would be first taken out of the net estate before distribution, and distribution made under the same rule that would otherwise govern it. Where the decedent makes a will he can allow the estate tax to fasten on his net estate in the same manner, or if he objects to this equitable method of imposing it upon the entire estate before distribution, he can insert a residuary clause or other provision in his will, the effect of which would more or less change the incidence of the tax.”

But this privilege was denied to Augusta Dickel. Seventeen months prior to the enactment of the statute she created the trust of April 21, 1915, and made irrevocable transfer of the securities embraced therein. (Trans. 179-188.) There was no way in which she could provide by her will that the beneficiaries under that trust agreement should pay the tax under any Federal Estate Tax Law thereafter passed. Whether Mrs. Dickel so willed it or not (if the position of the Courts below is

correct) the Federal Estate Tax imposed upon the transfer of April 21, 1915, must be paid by her executor after her death—as it was in fact paid, though under protest,—upon the demand of the Internal Revenue Collector in the instant cause.

If Mrs. Dickel had known, on April 21, 1915, that a law would thereafter be passed under which an estate tax might be levied upon the transfer then made, it may be that she would have preferred, in creating this trust, to reduce the same in the sum of \$56,000, rather than compel the payment of that sum out of her residuary estate. She was, however, unable to do this. She had created the trust by irrevocable instrument, and whether she wished it or not, the Federal Estate Tax Law thereafter passed (if it is held to cover this trust) casts the burden of the transfer tax not upon the persons to whom that transfer is made, but upon the residuary legatee under Mrs. Dickel's will. (Trans. 195-197.) We respectfully submit that this consideration is conclusive upon the point that the Federal Estate Tax Law was not intended by Congress to be retroactive and cannot justly be construed to be so.

(k) *The statute should be so construed as to remove doubts as to constitutionality.*

If the Estate Tax Law is construed to be retroactive and thereby to impose a tax upon the transfer of April 21, 1915, we shall point out, in succeeding divisions II and III of this brief, that it would be clearly unconstitutional. If it is not to be so construed as to be retroactive, the constitutional point need not be considered.

We now advert to a well recognized principle of statutory construction, that a statute shall be so construed, if possible, as to make it constitutional, and to avoid the

consideration of constitutional questions, even if such constitutional questions are not conclusive against the validity of the statute.

In *United States vs. Bennett*, 232 U. S. 299, 303, Chief Justice White, in delivering the opinion of the court, in a case involving a tax on foreign built yachts, referred to

“the elementary rule of interpretation that where there are two possible constructions of a statute, one of which will give rise to grave doubt as to its constitutionality and the other avoids such question, the latter will be adopted.”

In *McNally vs. Field* (C. C.), 119 Fed. 445, Circuit Judge Colt, in discussing the construction of the Federal Tax Law of 1901, said (p. 448):

“It is not necessary, however, to pass upon the constitutional power of Congress to levy this tax. It is sufficient for the purpose of this case that such a power is questionable or the fair subject of doubt. The present controversy turns on the construction of an ambiguous statute, and the court will never so interpret the statute as to involve the exercise of a doubtful constitutional power, if it is open to any other reasonable interpretation.”

The case of *United States vs. Jin Fucy Moy*, 241 U. S. 394, contains a recent statement of the principle by Mr. Justice Holmes (p. 401):

“A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.”

The Supreme Court, therefore, refused to construe the words “any person” in a revenue law to mean “all persons” but limited the words to persons clearly within the congressional power of taxation. This is identical to the limitation that must be made upon the words “at any time” in the Act of September 8, 1916, as we have above pointed out.

II.

If the Act of September 8, 1916, could be construed to be retrospective and to impose a tax upon the transfer of April 21, 1915, it would be unconstitutional and void as a denial of due process of law, and the taking of private property for public use, without compensation, and would create in effect an unapportioned direct tax and an exaction not within the taxing power of Congress.

As we mentioned in the first part of Division I. of this brief, Judge Sessions in the Court below (Trans. 160-162) endeavored to avoid this constitutional question by so interpreting the clear words of the statute as to impose a tax, not upon the *trust deed* of April 21, 1915, but merely upon the "*net estate*" of Mrs. Dickel remaining at the time of her death. We shall point out in Division III. of this brief that the statute can not be so construed and that, if it could be, nevertheless in substance an unconstitutional retroactive exaction is made with respect to the transfer of April 21, 1915, completed prior to the passage of the Act. We shall at this time point out that such retroactive taxation is unconstitutional. The District Judge, although he believed that he had avoided the question of the retrospective character of the tax, realized that he had not escaped the fact that the law as construed by him made an arbitrary and wholly indefensible classification (Trans. 162-163). He, nevertheless, upheld the law because as he stated (Trans. 162), "Courts may not inquire as to • • • the justice of taxes." This reason given by the Court will meet with our attention in succeeding Division III. hereof, but in this present division we shall also refer to constitutional limitations in this regard.

The Circuit Court of Appeals placed its decision upon a ground altogether different from that assigned by the District Judge. That court held that the Act in

question was not unconstitutional or void as denying due process of law or as violating the Fifth Amendment to the Constitution; that it was not invalid because retroactive and imposing a tax upon a transfer made before its passage. Because the Appellate Court placed its decision upon the ground that the Congress had the right to tax transfers made before the passage of the law, it found it unnecessary to consider the correctness of the construction placed upon the Act by the District Judge (Trans. 239). In this division of the brief we argue that the conclusion thus reached by the Court of Appeals is erroneous, and in the next division we shall consider the very different view taken by the District Judge.

The assignments of error upon which we rely in this division of our brief are as follows: the affirmance of the refusal of the trial court to grant plaintiff's motion for a directed verdict (Trans. 165; assignment 40; Trans. 219, 262); the affirmance of the refusal to grant plaintiff's first, second and twelfth requests to charge (Trans. 156, 159, 170; assignments of error, 41, 42, 52, Trans. 220, 223, 263, 267); the affirmance of the charge to the jury in substance that the law authorized the taking into consideration of property which had been transferred absolutely prior to the passage of the law, if said property had been transferred in contemplation of death (Trans. 166, 171, assignments of error 53 and 54, Trans. 224, 267, 268); and the affirmance of the denial of plaintiff's motion for new trial (Trans. 174, 176, assignment of error 64, Trans. 226, 270); assignment of error 67 on the opinion of Court of Appeals (Trans. 270, 237-239).

The Fifth Amendment to the Constitution of the United States provides:

"No person shall * * * be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without compensation."

As we have seen, the transfer in question was made in April, 1915, by irrevocable instrument, long before the passage of the Estate Tax Law. The property in question passed from Mrs. Dickel at that time to the Detroit Trust Company. The transfer being then completed, to take at a later date a portion of the property under guise of a succession tax, not authorized by law when the transfer was made, would be taking of private property for public use without any compensation whatsoever, and hence in direct contravention of the Fifth Amendment, and would create in effect an unapportioned direct tax and an exaction not within the taxing power of Congress.

(a) *Title vested in April, 1915.*

The full legal title vested at once in the Detroit Trust Company. That is the crucial point in this discussion. Even if the beneficial title had not vested at that time, it would be immaterial, for the deed became effective on April 22, 1915, when it was delivered (Trans. 31).

The rule is stated in the case of *In Re Webber*, 136 N. Y. S. 83, 85, already cited:

"The deed became operative *immediately upon its delivery with the intention of vesting title in the trustees for the purpose of the trust*, which provided for the final distribution of the property, and only the beneficiaries were postponed to the happening of a particular event, and the law of that contract must be determined by *the law as it existed when the deed became effective.*"

But a beneficial title also vested for life in Victor E. Shwab (Trans. 183).

United States vs. Fidelity Trust Co., 222 U. S. 158.

Muenter vs. Union Trust Co. (C. C. A.), 195 Fed. 480.

The remainder after the death of Victor E. Shwab, vested in the six nephews and nieces of Mrs. Dickel, and their issue (Trans. 183-184).

Chouteau vs. Allen (C. C. A.), 170 Fed. 412.

In Re Seaman, 147 N. Y. 69, 77.

In Re Green, 153 N. Y. 223.

Matter of Pell, 171 N. Y. 48.

Hovey vs. Nellis, 98 Mich. 374.

Porter vs. Osmun, 135 Mich. 361.

Our statute, in Michigan, relating to vested and contingent remainders is taken from New York. It provides:

"Future estates are either vested or contingent.

"They are vested when there is a person in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or preceding estate."

"They are contingent whilst the person to whom, or the event upon which they are limited to take effect, remains uncertain."

(3 Michigan, Compiled Laws, 1915, Sec. 11531.)

Under this statute the definition of a vested remainder is given in Moore vs. Littel (2 Hand), 41 N. Y. 66, 76, where Judge Woodruff says:

"If there 'is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the precedent estate, then that remainder is vested' within the terms of the statute. It is not 'a person *who now has a present* fixed right of future possession or enjoyment,' but a person who would have an immediate right if the precedent estate were now to cease. I read this language according to its ordinary and natural signification, and

if you can point to a human being and say as to him, 'that man or that woman, by virtue of a grant of a remainder, would have an immediate right to the possession of certain lands if the precedent estate of another therein should now cease,' then the statute says he or she has a vested remainder."

The trial judge, in view of the above decisions, was compelled to admit that the deed of trust of date April 21, 1915, created forthwith an absolute vested estate in the trustee and the beneficiaries, over which Mrs. Dickel retained no control whatsoever (Trans. 160-161, 163-164, 167), and we believe that this must be taken as conceded by the defendant in error. The trial judge, however, did not clearly state to the jury, as he should have done in view of this conclusion, that no tax could be levied with respect to the transfer of April 21, 1915, upon the theory that it was a transfer to take effect in possession or enjoyment at or after death; but he refused plaintiff's third request to charge which was to that effect (Trans. 157, 170; assignment of error 43, Trans. 220).

(b) *The rights of the beneficiaries under the deed of trust, having accrued upon the execution and delivery of the deed, are immune from subsequent legislative attack.*

The tax here in question is a succession tax. It is not a tax upon the property itself, but upon the transmission by descent or will or other instrument testamentary in character.

United States vs. Perkins, 163 U. S. 625, 628, 629.
Magoun vs. Illinois Trust & Savings Bank, 170 U. S. 283, 288.

Knowlton vs. Moore, 178 U. S. 41.

Cahen vs. Brewster, 203 U. S. 543, 550.

Inasmuch as it is a succession tax, it follows that such a tax cannot be levied except where there is a succession

and when the succession is still open, some step necessary to complete it being still wanting when the tax law goes into effect. This is the very ground upon which the Supreme Court of the United States rested its decision upholding the succession tax in *Cahen vs. Brewster*, 203 U. S. 543.

If there is no succession, or if the succession has fully vested, or if it is no longer a privilege dependent for its continuance upon Government permission, an attempt to levy a tax under the power to regulate the succession is an attempt to take private property for public use without any compensation whatsoever. Even though other taxes might be levied, a succession tax cannot be, and the attempt so to do is in direct contravention of constitutional principles.

In view, doubtless, of the unanimity of decisions concerning State legislation and holding such statutes unconstitutional when they have purported to tax vested estates, counsel for defendant contended in the court below that such decisions are irrelevant in that there is claimed to be no limitation whatever upon the power of Congress while the States are limited by the Fourteenth Amendment. We refer specifically to the limitations upon Congress in subdivision (h) of this division of the brief and elsewhere, but at this time wish to point out that the limitations upon the States by the Fourteenth Amendment is the same as that upon Congress.

Carroll vs. Greenwich Ins. Co., 199 U. S. 401, 410.

Chanler vs. Kelsey, 205 U. S. 466, 479.

In *Carroll vs. Greenwich Insurance Company*, 199 U. S. 401, Mr. Justice Holmes said for the court (p. 410):

“While we need not affirm that in no instance could a distinction be taken, *ordinarily, if an Act of*

Congress is valid under the Fifth Amendment, it would be hard to say that a State law in like terms was void under the Fourteenth Amendment."

In *Chanler vs. Kelsey*, 205 U. S. 466, Mr. Justice Holmes, in a dissenting opinion in which Mr. Justice Moody concurred, but which dissent did not differ from the majority in so far as questions of constitutional law were concerned, said (p. 479):

"I always have believed that a state inheritance tax was an exercise of the power of regulating the devolution of property by inheritance or will upon the death of the owner,—*a power which belongs to the States*; and I have been fortified in my belief by utterances of this court from the time of Chief Justice Taney to the present day.

* * * *For that reason the power is more unlimited than the power of a State to tax transfers generally or the power of the United States to levy an inheritance tax."*

It therefore appears that decisions limiting the state power of inheritance taxation are squarely in point with reference to such taxation by the Federal government.

We refer to the following decisions, which hold that a tax upon a vested transfer completed prior to the enactment of the law is unconstitutional.

Matter of Pell, 171 N. Y. 48, 55.

Matter of Lansing, 182 N. Y. 238.

Commonwealth vs. Wellford, 114 Va. 372.

Hunt vs. Wicht, 174 Cal. 205.

Blair vs. Herold (C. C.), 150 Fed. 199; (affirmed on opinion below in C. C. A., 158 Fed. 804).

Lacey vs. State Treasurer, 152 Ia. 477.

Executors vs. State, 72 O. St. 448.

State vs. Probate Court of Washington Co., 102 Minn. 268.

In Re Petit's Estate, 72 N. Y. S. 479; (affirmed on opinion below, 171 N. Y. 654).

In *Re Ripley's Estate*, 106 N. Y. S. 844; (affirmed on opinion below, 192 N. Y. 536).

In *Re Haggerty*, 112 N. Y. S. 1017; (affirmed on opinion below, 194 N. Y. 550).

In *Re Hitchens Estate*, 89 N. Y. S. 472; (affirmed on opinion below, 92 N. Y. S. 1128, 181 N. Y. 553).

Matter of Langdon, 153 N. Y., 6.

In *Re Horler's Estate*, 161 N. Y. S., 957.

Arenac Co. Supervisors vs. Iosco Co. Supervisors, 158 Mich., 344.

In *Matter of Pell*, 171 N. Y. 48, testator died in 1863, creating by his will a life estate, followed by remainder to nephews and nieces, and their issue. The life tenant died in 1899, after the passage of a law in New York expressly taxing all remainders which had vested prior to 1885, but which would not come into actual possession or enjoyment until after the passage of the Act. It was held that the remainders were vested prior to 1885, and that this inheritance tax law expressly covered them, but that the law was unconstitutional. Judge Bartlett, delivering the opinion of the Court, said (p. 55):

"This court and the Supreme Court of the United States have held in numerous cases that the transfer tax is not imposed upon property but upon the right of succession. It therefore follows that *where there was a complete vesting of a residuary estate before the enactment of the transfer tax statute, it cannot be reached by that form of taxation*. In the case before us it is an undisputed fact that these remainders had vested in 1863, and the only contingency leading to their divesting was the death of a remainderman in the lifetime of a life tenant, in which event the children of the one so dying would be substituted. If these estates in remainder were vested prior to the enactment of the transfer tax act, there could be in no legal sense a transfer of the property at the time of possession and enjoyment. This be-

ing so, to impose a tax based on the succession would be to diminish the value of these vested estates, to impair the obligation of a contract, and to take private property for public use without compensation."

Matter of Lansing, 182 N. Y. 238, is also in point. Thomas Suffern died in 1869, leaving a will, by which he gave a share of his residuary estate to his daughter, Mrs. Lansing, for life, with power of appointment. In case the power was not exercised, the property was to go, at the daughter's death, to her heirs. Mrs. McVickar, the daughter of Mrs. Lansing, was her sole heir at law at her death. Mrs. Lansing died after the enactment of the New York statute of 1897, which expressly taxed property passing under a power of appointment created before or after the Act, and also provided that failure or omission to exercise a power of appointment subjects the property to a transfer tax in the same manner as if the donee of the power had owned the property and had devised it by will. Mrs. Lansing, by will, exercised the power of appointment in favor of her daughter Mrs. McVickar. The court held that Mrs. McVickar would have taken the property anyway under the will of Thomas Suffern, even if Mrs. Lansing had not exercised the power of appointment, and that the exercise of the power therefore was of no effect, and that the tax was not collectible, the statute being unconstitutional.

On page 247 it is said by Judge Vann:

"We pass, without serious discussion, that part of the statute which provides, in substance, that the failure or omission to exercise a power of appointment subjects the property to a transfer tax in the same manner as if the donee of the power had owned the property and had devised it by will. (L. 1897, ch. 284, §220, subd. 5). *Where there is no transfer there is no tax and a transfer made before the passage of the act relating to taxable transfers is not affected by it, because as we held in the Pell case, such an act imposes no direct tax and is unconstitu-*

tional since it diminishes the value of vested estates, impairs the obligation of contracts and takes private property for public use without compensation. Matter of Pell, 171 N. Y. 48; Matter of Delano, 176 N. Y. 486, 495).

"After the death of Mr. Suffern and the vesting of the remainder in Mrs. McVickar no statute could prevent her from entering into the full enjoyment of the property upon the death of Mrs. Lansing. *The law sanctioned the gift of Mr. Suffern when it was made and the law cannot cut down the gift by imposing a transfer tax when there was no transfer.*"

Commonwealth vs. Wellford, 114 Va. 372. By will a remainder had become vested in 1861, subject to a life estate. In 1896 an inheritance tax law was passed. In 1907 the life estate terminated. The court held that the statute was not retroactive and should not be so interpreted, and furthermore, that it would be invalid and unconstitutional if so interpreted, saying (p. 380):

"These cases (Craig's Estate, 181 N. Y. 555; *In re Pell's Estate*, 171 N. Y. 48) sufficiently illustrate the doctrine, which is plain on principle without authority, that a collateral inheritance tax statute, which becomes a law after an estate has vested in interest, cannot apply to such an estate, though it does not come into the actual possession and enjoyment of the owner until after the passage of the act."

Blair vs. Herold (C. C.), 150 Fed. 199, affirmed by the Circuit Court of Appeals of the Third Circuit, in 158 Fed. 804, arose under the Act of Congress of 1898, taxing "any personal property or interest therein, transferred by deed, grant, bargain, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor." A tax was imposed upon the transfer of a partnership interest which, upon the death of the owner in 1899, passed to his son. This passing of the interest to the son, however, was in

accordance with a partnership agreement made in 1890, before the enactment of the Estate Tax Law. The tax was held invalid. One of the grounds upon which Judge Cross based his decision was the fact that the partnership agreement was made prior to the enactment of the statute in 1898, and that the interest in remainder was, therefore, vested prior to the passage of the Act. The Court cited *Matter of Pell*, 171 N. Y. 48, and the other New York decisions upon which we now rely, saying (p. 207):

"In the case at bar I think the plaintiff's rights accrued at 'once the partnership agreement was entered into. They were *absolute and irrevocable so far as the parties were concerned*, and were contingent only upon the happening of an event which did happen. The case appears to me to be within the principle laid down by the above authorities."

(c) *Even if the remainders, after the life estate to Victor E. Shwab, were contingent, the rule would be the same.*

The cases cited in the preceding subdivision (b) show that when a transfer has become vested it has uniformly been held to contravene constitutional principles to impose an inheritance tax thereon. But the adjudged cases go farther than this. If the transfer consists in the creation of a contingent remainder, yet if that interest is acquired prior to the enactment of the Inheritance Tax Law, it is none the less a property right. It becomes such forthwith upon the creation of the contingent remainder, and is just as secure and just as immune from legislative attack as any other property right.

In *Re Craig's Estate*, 89 N. Y. S. 971; (affirmed on opinion below, 181 N. Y. 551).

Matter of Vanderbilt, 172 N. Y. 69, 73.

Matter of Lansing, 182 N. Y. 238, 248.

Blair vs. Herold (C. C.), 150 Fed. 199, 207.

Matter of Lansing, supra, has been referred to by us in the preceding subdivision (b). The majority of the court there held that the interest taken by Mrs. McVickar under her grandfather's will was vested. The minority of the court held that it was contingent only. Upon this point Judge Vann, in the opinion of the majority of the court said (p. 248):

"Even if her interest was contingent, nevertheless, as was said by Judge Cullen in a later case, *'the interests of the devisee accrued on the death of the testator and at that instant, and were immune from legislative attack, whether contingent or vested.* (Matter of Vanderbilt, 172 N. Y. 69, 73, citing Brevoort vs. Grace, 53 N. Y. 245.)

"It is not at all necessary to determine whether the remainder which Mrs. McVickar took under her grandfather's will was vested or contingent. If we assume that the remainder was contingent, nevertheless it was acquired by Mrs. McVickar under her grandfather's will at the instant of his death. It then became a property right in her which was just as sacred and just as immune from legislative attack as any other property right. * * * It is true that Mrs. McVickar's estate was subject to be defeated by her death before her mother, or by diminution if her mother left other children, but her right to the estate if she survived her mother was indefeasible. I am at a loss to see what bearing the question of a remainder being vested or contingent has to do with the liability to the transfer tax when that remainder was created prior to the imposition of any transfer tax. The theory of a transfer tax is that it is a tax on the right accorded to take under a will or to succeed in case of intestacy which, it is said in the decisions, are privileges that may be accorded or denied by the state."

The case of *In Re Craig's Estate*, 89 N. Y. S. 971, affirmed on opinion below, 181 N. Y. 551, concerned the same New York statute as that mentioned in the pre-

ceding case, and which taxed remainders vested prior to 1885, but coming into possession and enjoyment after the passage of the act. The inheritance tax law of New York since 1891 had also placed a tax upon transfers by deed or gift made in contemplation of death or intended to take effect in possession or enjoyment at or after death. In that case it appeared that in 1875 Hector Craig executed a trust deed with interest to himself for life, and then to his wife and children in certain specified proportions. Prior to 1885 certain children were born, who, with the wife, became entitled to the possession and enjoyment of the property upon the death of Hector Craig in 1902. There was no inheritance tax law in New York until 1885. It was held by the court that, although the statute expressly covered the gift in question, the same was not taxable, inasmuch as the statute was to that extent unconstitutional.

The court said (p. 972):

"It seems to me to be immaterial to consider whether the remainders created by the trust instrument to which the appellants have now become entitled are to be regarded as vested or contingent, or whether the instrument is to be regarded as conveying such remainders as gifts inter vivos, or as gifts causa mortis. The point presented by the appeal is that the right as a property right to take the gifts when the time for possession and beneficial enjoyment should ultimately arrive had fully accrued at the date of the marriage and the birth of the children, free from any existing tax upon the transfer, either made or contemplated, and that subsequent legislation imposing such tax must be deemed unconstitutional, as, in effect, the taking of private property for public use without compensation or as impairing the obligation of a contract."

The court then stated the appellant's contention in full, and continued:

"I am inclined to the view that the contention is sound. In the discussion the appellants must be regarded on May 19, 1885, as being in the same position as they would have been in if the remainders had been acquired by purchase instead of gift, and it cannot be that the state can levy an assessment upon the right of a citizen to enjoy the fruits of a prior purchase, which, when made, was wholly free from such an imposition."

See also:

In *Re Smith*, 135 N. Y. S. 240

In *Matter of Chapman*, 117 N. Y. S. 679, 681:
(affirmed on opinion below, 196 N. Y. 561).

(d) *The tax imposed interferes with rights already vested under the deed of April 21, 1915.*

The Circuit Court of Appeals declared (Trans. 237) that, in its opinion, the validity of the tax "must depend upon whether or not it can be said to interfere with vested rights." But "as regards this consideration," the court added, "we may set to one side the interests of the beneficiaries under the trust deed." Apparently the court recognized the force of the decisions cited in the preceding subdivisions (b) and (c), but it sought to escape their application to the case in hand by the further suggestions made in the opinion (Trans. 237-238) that the beneficiaries are not taxed or complaining; that no interest of theirs, vested or unvested, is taken; that the tax was levied upon and collected from the estate and that the residuary legatees are the ones compelled to pay the tax. We respectfully submit that the circumstances alluded to do not militate against our claim that the imposition of this tax upon a transfer completed before the passage of the Act impairs vested rights and is, therefore, void. It goes only to the question *whose* rights are impaired.

The position thus taken concedes, for the purpose of the argument, that, as against the protest of the bene-

ficiaries, no valid tax can be imposed because to impose the same would impair their vested rights. This necessarily results because if an excise is imposed upon the privilege of making or receiving the transfer and the transfer is completed before the passage of the Act, the so-called excise is not an excise or tax, but a mere arbitrary exaction the imposition of which takes private property without due process of law, and likewise takes it for public use without compensation, and hence is in violation of the Fifth Amendment. But the validity of the tax does not all depend upon whose property is taken. It cannot be true that the tax so levied is void if the property of the beneficiaries, to whom the gift is made is seized for the satisfaction thereof, but valid if satisfied from the property of the residuary legatees to whom the gift was *not* made. If the trust deed of April 21, 1915, was a completed transaction whereby the title of the beneficiaries was vested prior to the passage of the Act, and hence incapable of being subjected, against their protest, to an excise tax upon the completed transfer, so likewise was it a completed transaction as respects Mrs. Dickel and those taking under her will her residuary estate, and hence incapable of being subjected against their protest to an excise tax upon the completed transfer.

The opinion of the Circuit Court of Appeals declares (Trans. 237-238), that the tax in the instant cause does not "interfere with vested rights" because "decedent's estate alone, and those interested therein under her will, must bear the burden." With all deference we submit that this is an obvious *non sequitur*. It makes the validity of the tax depend upon the adventitious circumstance that, after Mrs. Dickel made the conveyance to the Detroit Trust Company there remained to her property sufficient in amount to satisfy the tax upon the

transfer. But it is too clear for discussion that whether "rights" were "vested" under that conveyance prior to the passage of the Act depends upon the nature of the conveyance and the delivery thereof, and not at all upon the circumstance that Mrs. Dickel had something left, after that conveyance was made, upon which revenue officers could seize for the satisfaction of demands not otherwise enforceable. If no valid tax could be levied upon the transfer of April 21, 1915, because to levy the same would impair vested rights, it follows that no valid tax could be levied in respect of such transfer upon the estate of Mrs. Dickel remaining at her death, except upon the theory advanced by District Judge Sessions at the trial, viz.: that the tax was solely upon the estate left at Mrs. Dickel's death, but might be measured by the value of that estate, plus the value of the property embraced in the transfer of April 21, 1915. But the Circuit Court of Appeals expressly declined to place its decision upon this ground (Trans. 239), and in the succeeding division of this brief we shall show that it is untenable.

(e) *The Estate Tax Law, if construed to be retroactive and to cover the deed of trust of April 21, 1915, discriminates unjustly between tax-payers, and makes an arbitrary and fanciful classification for purposes of taxation.*

If the view to which judgment of the court below inevitably leads is adopted, and the statute is held to apply to transfers fully executed before its adoption, it can readily be seen that the classification for purposes of taxation is arbitrary. The statute would then tax gifts even though made twenty-five years before the enactment of the Estate Tax Law, but would not tax *all* such gifts. The tax upon the transaction completed long prior to the enactment of a law would be based up-

on the capricious circumstance of length of life of a donor who had wholly ceased to be interested in the property transferred.

At the time when the donee received an absolute gift he could not tell whether or not it would be taxable, even though he took into consideration the possibility that at some future date an Inheritance Tax Law would receive the sanction of Congress. If the person making the gift died before the enactment of such law, it would not be taxable, but if the donor lived even but an instant of time after the enactment of such law, then the prior vested gift would be taxable.

It is apparent that such an interpretation of the law would make it apply to one trust deed and not to another, although both deeds were made at the same time, for the same purpose, and upon the same conditions. The fortuitous circumstance that the donor in one of the gifts died on September 7, 1916, and that the other died on September 9, 1916, would allow the one gift to escape taxation, and subject the other to it. Such classification is purely arbitrary and not based upon any distinction defensible upon constitutional grounds.

Another important aspect in which the classification for taxation upheld by the trial court is arbitrary and unsound is that a transfer made and completed long prior to the law is taxed not at its value *when made*, but at its value, perhaps twenty-five years later, *at the time of the death of the transferor*. This is made evident by the express words of section 202 of the Act of September 8, 1916. Furthermore, the rate of the tax becomes higher as the estate of a decedent rises in value, so a transfer completed prior to the Act, if the lower court is sustained, will be taxed not proportionately to its own value alone, but proportionately to that value plus the value of the estate still owned by the creator

of the trust at his death, perhaps many years later. Thus, if A and B each received absolute gifts from different donors of equal wealth in 1900, which gifts were then worth \$50,000.00 each: even had A and B anticipated the passage of the Act of September 8, 1916, and that the court would construe it so as to cover their gifts, they could not have known the rate of tax. If A's gift had increased in value so that at the time of the death of his donor, his gift was worth \$200,000.00, and his donor died after the passage of the Act with property still in his possession worth \$1,000,000.00, A's gift would be taxed at a high rate. If B's gift, on the other hand had decreased in value to \$10,000.00, and his donor died after the passage of the Act with less than \$40,000.00 of other property, B's gift would altogether escape taxation. Absurdities of this sort are reached by the lower court's decision in the instant cause.

In construing the Federal inheritance tax law of 1898, the United States Supreme Court refused to hold that the law brought about such inequalities and absurdities as confirmed in the court below. In *Knowlton vs. Moore*, 178 U. S. 41, Mr. Justice White, in refuting a contention of counsel that the law should be construed to bring about unequal results such as we have mentioned, said (p. 76):

"It would thus come to pass that the same person occupying the same relation and taking in the same character, two equal sums from two different persons, would pay in one case more than twice the tax that he would in the other. * * * We are therefore bound to give heed to the rule, that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute."

We shall make further reference to the above decision in Division III. of this brief and point out that it demonstrates the error of Judge Sessions's decision on Constitutional grounds.

Nor is it any answer to the argument here presented that the executor of the estate pays the tax and the recipient of the gift is relieved from obligation to do so. By the express terms of Sec. 209, the transferee or trustee is made *personally* liable for the tax, and the property transferred is also made subject to a lien equal to the amount of the tax. It is obvious that vested rights acquired long prior to the passage of the Estate Tax Law are thereby impaired. Even the trial judge, although he went to great lengths, could not bring himself to state that the section 209 was valid (Trans. 162).

But if the tax be regarded as imposed solely upon the executor, rather than upon the trustee or beneficiaries in the deed of trust, it is equally indefensible. A tax is imposed upon no proper basis if it takes the property of the *residuary legatee* under Mrs. Dickel's will, because in her lifetime she made a gift to *others*, which gift was lawful when made and *then* fully executed, and chargeable with no burden and subject to no diminution under any existing law.

Cahen vs. Brewster, 203 U. S. 543, is of interest upon this point. In that case the question was raised whether the Louisiana Inheritance Tax Law made a proper classification, inasmuch as it did not tax the estates solely of persons dying after the passage of the act, but taxed estates of those who died before the passage of the act, but which were not distributed until after its passage. It was claimed that this was an arbitrary classification. Mr. Justice McKenna, in the opinion of the court, said (pp. 551-552):

"It (the State) may select the moment of death, or it may exercise its power *during any of the time it holds the property from the legatee.* . . ."

"Successions which have been closed, it is said, are exempt from the tax, and a discrimination is made between heirs whose rights have become fixed and vested on the same day. Counsel say: 'The closing of the succession cannot affect the question as to when the rights of the heirs vested; and cannot be a cause for differentiation among the heirs; and such a classification is purely arbitrary. . . .'" But, as we understand, the Supreme Court made the validity of the tax depend upon the very fact which counsel attack as an improper basis of classification. The court decided that the property bequeathed was property the State could tax, 'until it had passed out of the succession of the testator.' It was certainly not improper classification to make the tax depend upon a fact *without which it would have been invalid.* In other words, those who are subject to be taxed cannot complain that they are denied the equal protection of the laws because those who cannot legally be taxed are not taxed."

In *Cahen vs. Brewster* the classification was, therefore, sustained because the succession had not been closed and the State still withheld the property from the legatee when the law imposing the tax was passed. It is distinctly recognized that if the succession had been closed (or the transaction completed) when the law was passed, the tax "would have been invalid." In the suit at bar the property in question wholly passed from Mrs. Dickel to the Detroit Trust Company in April, 1915, and no law then authorized the imposition of an estate tax.

That taxation may not be made on any such odd classification or in such an unheard of manner is shown in the case of *The Conqueror*, 166 U. S. 110, 115. That case involved the liability of the yacht "Conqueror" for

import duties, and she was held not taxable under the Tariff Laws of the United States. In the opinion of the court, by Mr. Justice Brown, it is said (p. 115):

“Vessels certainly { have not been treated as dutiable articles, but rather as the vehicles of such articles, and though foreign built and foreign owned, are never charged with duties when entering our ports, though every article upon them, that is not a part of the vessel or of its equipment or provisions, is subject to duty, unless expressly exempted by law. If this yacht had been brought here by a foreigner, it is not insisted that she would have been subject to duty. Indeed, she might be navigated between our ports for an unlimited time, provided only that she did not carry passengers or goods for hire. If she be dutiable at all, it must then be because she was bought by an American citizen. But why should this make her dutiable? She is not imported or taken into the country in the ordinary sense in which that term is used with reference to other articles, does not become commingled with the general mass of property, and is employed precisely as she might be legally employed by her foreign owners, or by an American citizen leasing her from such owner. Other articles are dutiable, not because they have been purchased, but because they are actually imported and become the subject of sale and commerce within the country. But if a yacht be dutiable when purchased, and only when purchased by an American citizen, we apply a test of dutiability that we apply to no other article, namely, *the test of ownership.*”

To base an inheritance tax not upon the question of succession, but upon an entirely different circumstance, is not to impose an inheritance tax at all.

That the fanciful and arbitrary classification to which we have above alluded cannot be sustained consistently with constitutional principles also appears upon reference to *Pollock vs. Farmer's Loan & Trust Company*, 157 U. S. 429, 599-600. In the opinion of the court, by Mr. Justice Field, it is said:

"But there are other considerations against the law which are equally decisive. They relate to the uniformity and equality required in all taxation, national and State; to the invalidity of taxation by the United States of the income of the bonds and securities of the States and of their municipal bodies; and the invalidity of the taxation of the salaries of the judges of the United States courts."

"As stated by counsel: *'There is no such thing in the theory of our national government as unlimited power of taxation in Congress. There are limitations,'* as he justly observes, *'of its powers arising out of the essential nature of all free governments; there are reservations of individual rights, without which society could not exist, and which are respected by every government. The right of taxation is subject to these limitations.'* *Loan Association vs. Topeka*, 20 Wall. 655, and *Parkersburg vs. Brown*, 106 U. S. 487.

"The inherent and fundamental nature and character of a tax is that of a contribution to the support of the government, levied upon the principle of equal and uniform apportionment among the persons taxed, and any other exaction does not come within the legal definition of a tax."

"This inherent limitation upon the taxing power forbids the imposition of taxes which are unequal in their operation upon similar kinds of property, and necessarily strikes down the gross and arbitrary distinctions in the income law as passed by Congress. The law, as we have seen, distinguishes in the taxation between corporations by exempting the property of some of them from taxation and levying the tax on the property of others when the corporations do not materially differ from one another in the character of their business or in the protection required by the government. Trifling differences in their modes of business, but not in their results, are made the ground and occasion of the greatest possible differences in the amount of taxes levied upon their income, showing that the action of the legislative power upon them has been arbitrary and capricious and sometimes merely fanciful."

(f) *The authorities on which the lower court relies do not sustain its contention.*

In the opinion of the Circuit Court of Appeals (Trans. 238) it is said that the statute is not invalid because applying to transfers made before its passage; that, being within the all-embracing power of Congress over the subject of excise and transfer taxation, it is not necessarily unconstitutional merely because retroactive. Adjudged cases are cited to uphold this contention; and while the court admits that none of the cases referred to is on all-fours with the instant case, it thinks the principles they announce are decisive.

One of the cases so cited (Trans. 238) is *Billings vs. United States*, 232 U. S. 261, 282, and the court below asserts that the validity of the 1909 tonnage act was there assailed as retroactive. The Act of Congress there under consideration imposed a tax upon the use of foreign-built yachts. The Act went into effect on August 6, 1909 (232 U. S. 277). It declared that the tax should be levied and collected on the first day of September. This was held to mean the first day of September *after* the passage of the act (p. 279). It is true that a great part of the year had expired when the act was passed, but the period for the use of which the tax was imposed had not expired. There was, therefore, no attempt in that case to levy an excise upon a transaction wholly completed before the law authorizing the excise was passed.

The Court of Appeals further cites, as upholding the power to tax transfers completed prior to the passage of the Act of Congress authorizing such tax two income tax cases. One of these (*Stockdale vs. Insurance Co.*, 20 Wall. 323) arose under the income tax law of 1867, and the other (*Brushaber vs. Union Pacific R. R. Co.*, 240 U. S. 1, 20) under the income tax law of 1913. We do

not dispute that an income tax law may be made so far retrospective as to embrace the entire of the current taxable year, but we submit that that case is not at all analogous to the one now under consideration.

An income tax law, if made to embrace the income of a preceding year, taxes *all* incomes for such year. A retroactive estate tax law, as upheld by the court below, does not tax all gifts made within a certain period prior to the enactment of the law, but only *certain* of such gifts, that is to say, gifts made by donors who chance to die after the passage of the act.

Another reason why income tax cases, in which a retrospective tax has been sustained, are wholly inapplicable, is that such taxes are taxes on property and hence direct taxes, and not excise taxes. The Circuit Court of Appeals, indeed, makes this distinction. It asserts that the tax here in question is not to be classified as a direct tax, and thus void as within the constitutional requirement of apportionment; that it is clearly an excise or duty tax (Trans. 237). Having made this distinction, on the following page of the opinion it is argued that income taxation has been held not necessarily unconstitutional because retroactive, and that the same principle applies to excise taxation. The income tax law of 1894 was held invalid in *Pollock vs. Farmers' Loan & Trust Co.*, 157 U. S. 429, for the very reason that taxes on the income of real estate were deemed to be direct taxes. They are valid now, without apportionment among the States, only because of the adoption of the Sixteenth Amendment.

Brushaber vs. Union Pacific Railroad Co., 240 U. S. 1.

Inasmuch as an income tax is a direct tax, it of course, may be levied retroactively, as many direct taxes are. That is far different from levying a privi-

lege or excise tax like that in the instant cause upon prior vested transactions after the right of the taxpayer to exercise the privilege and incur the tax or not, as he may choose, has passed. These considerations render beside the point all arguments as to retroactive taxation based upon the Stockdale and Brushaber cases above cited. The tax involved in those two cases, being an income tax, is a tax on property; but this estate tax, if it can be upheld at all, can be upheld only as an excise tax. An excise tax is a privilege tax. It is of the essence of such a tax that it cannot be imposed except as the privilege is exercised. This is maintained by the authorities cited in the succeeding subdivision (g) of this division of our brief.

It is further said by the Circuit Court of Appeals (Trans. 238) that *Cahen vs. Brewster*, 203 U. S. 543, is not without a certain amount of analogy. This case is cited by us in the preceding subdivision (e) and it is shown that the tax was there sustained because the succession had not been closed and the State still withheld the property from the legatee when the law imposing the tax was passed. Mr. Justice McKenna's opinion, indeed, distinctly recognizes that, if the succession had been closed (or the transaction completed) when the law was passed, the tax "would have been invalid."

Again, it is asserted by the Circuit Court of Appeals (Trans. 238-239) that there is no controlling difference in principle "between an estate tax upon a transfer created by will and one upon a transfer created by testamentary deed, merely because in the one case a right of revocation existed while in the other it is absent or because one took effect before and the other after the death of the transferrer." We do not think this correctly states our position. We do not found our argument against the validity of this tax merely upon the

ground that the right of revocation was absent, nor merely upon the ground that the deed took effect *before Mrs. Dickel's death*; but upon the more solid ground that this deed, absolute in character and subject to no right of revocation, took effect not merely in Mrs. Dickel's lifetime, but *before the passage of an Act of Congress* authorizing the imposition of an excise tax upon the transfer then made.

(g) *The tax is not an excise tax and cannot be sustained as a direct tax.*

An inheritance tax is a tax, as we have seen, upon the privilege of succeeding to property. Such a tax in its very nature is an *excise* tax, as distinguished from a *direct* tax. It is said in the opinion of the Appellate Court (Trans. 237) that the tax here in question is not to be classified as a direct tax, and thus void as within the constitutional requirement of apportionment; that it is clearly an excise or duty tax.

In *Knowlton vs. Moore*, 178 U. S. 41, Mr. Justice White considered the distinction between direct and indirect taxes, quoting approvingly the French definition (p. 47):

"Direct taxes bear immediately upon persons, upon the possession and enjoyment of rights; indirect taxes are levied *upon the happening of an event or an exchange.*"

If the tax in the instant cause can be sustained at all, it must be sustained as an indirect or excise tax, levied "upon the happening of an event," that is to say, the transfer made by Mrs. Dickel to the Detroit Trust Company on April 21, 1915.

But the tax levied in the instant cause lacks the essential qualities of an excise tax. In the case of an excise tax one can incur it or not, as he chooses. If one does not wish to exercise the privilege or to do the

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thing in respect of which the tax is imposed, he can avoid the tax. In the case of a proposed transfer this can be done by refusing to accept the transfer. Such a case was *Matter of Lansing*, 182 N. Y. 238, cited in subdivision (b) above. This opportunity was not open to the grantee or beneficiaries under the trust deed of April 21, 1915.

When the trust deed was executed, it was not in contemplation of any of the parties thereto that a tax would ever be imposed in respect of the transfer then made. The Detroit Trust Company accepted the trust upon this understanding; yet, by a later statute, the grantee and beneficiaries are liable to a tax, and their property is subject to a lien for the amount thereof, if the judgment of the court below is not reversed. There is no way in which they could have avoided this tax. An absolute and unavoidable demand is made upon them, not because they chose to exercise some privilege or to do some act which they might have refrained from exercising or doing, but because in the past, without knowledge of the intent to impose an inheritance tax, and before any such tax had been made lawful, they took title to property by absolute and irrevocable conveyance.

It is clear that such a tax is not an excise, and therefore is not constitutional, unless apportioned among the States.

Thomas vs. United States, 192 U. S. 363.

Flint vs. Stone Tracy Co., 220 U. S. 107.

Thomas vs. United States, *supra*, was a case concerning a stamp tax placed upon sales of corporate stock. In holding the tax constitutional as a privilege tax, Chief Justice Fuller said (p. 371):

“The stamp duty is contingent on the happening of the event of sale, and the element of absolute and unavoidable demand is lacking.”

In *Flint vs. Stone Tracy Co.*, *supra*, the Supreme Court held the corporate excise tax of 1909 to be constitutional. In speaking for the court on excise or privilege taxation, Mr. Justice Day said (p. 151):

"As was said in the *Thomas* Case, 192 U. S. 363, *supra*, the requirement to pay such taxes involves the exercise of privileges, and the element of absolute and unavoidable demand is lacking. If business is not done in the manner described in the statute, no tax is payable."

If, therefore, the tax in the instant cause could be sustained at all, it would necessarily be sustainable not under the guise of an excise tax, but only as a direct tax. But as a direct tax it cannot be upheld, because in violation of the express provisions of the Constitution of the United States respecting the manner in which direct taxes must be levied.

Pollock vs. Farmers' Loan & Trust Co., 157 U. S. 429.

To be sure the tax created by the Act of September 8, 1916, is in form an excise tax, but if the lower court's decision construing the law to levy a tax with respect to past completed transactions is affirmed, it will in substance be a direct tax. We refer to the concise expression of Mr. Justice Hughes in *Kansas City Ry. vs. Botkin*, 240 U. S. 227, 235:

"Undoubtedly, a tax may be in form a privilege tax and yet, in substance, may be a tax on property."

(h) *This alleged tax is beyond the scope of legislative power.*

From what has already been said, it is obvious that to impose such tax as that here sought to be upheld is in excess of any power vested in Congress by the Federal Constitution.

We do not contend that the Estate Tax Law is unconstitutional. We concede that the Congress has authority to impose an excise upon the devolution of property by intestacy or by will or other instrument testamentary in character. But the broad powers given to Congress to impose taxes are limited in extent, and under the guise of a taxing law the Congress cannot make levies which are of effect to take the property of the citizen without compensation, and in a grossly discriminatory manner.

In *Sinking Fund Cases*, 99 U. S. 700, 718-719, Chief Justice Waite said:

“The United States cannot, any more than a State, interfere with private rights, except for legitimate Government purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable.”

On page 720 the Chief Justice speaks of the scope of legislative power, saying:

“That this power has a limit, no one can doubt. All agree that *it cannot be used to take away property already acquired* under the operation of the

charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made; * * * .”

In *Loan Association vs. Topcka*, 20 Wall. 655, 663, Mr. Justice Miller, speaking of the taxing power, said:

“The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

“There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B, who were husband and wife to each other, should be so no longer, but that A should thereafter be the husband of C, and B the wife of D. Or which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B.”

In *Brushaber vs. Union Pacific Ry. Co.*, 240 U. S. 1, 24, Chief Justice White says, in effect, that the Fifth Amendment does not take away the power to tax conferred upon Congress by other provisions of the Federal Constitution. He adds that it must be conceded:

“that this doctrine would have no application in a case where, *although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property. that is, a taking of the same in violation of the Fifth Amendment, or what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion.*”

In *Chanler vs. Kelsey*, 205 U. S. 466, Mr. Justice Holmes, in a dissenting opinion, concurred in by Mr.

Justice Moody, discussed the question whether the exercise of a power of appointment was properly taxable under a New York statute permitting the same. Upon page 480 he said:

“If then a given state tax must be held to be a succession tax in order to maintain its validity, or if in fact it is held to be a succession tax by the state court of which it is the province to decide that matter, it follows that such a tax cannot be levied except where there is a succession, and when some element or step necessary to complete it still is wanting when the tax law goes into effect. If some element is wanting at that time, the succession depends, for taking effect, on the continuance of the permission to succeed or grant of the right on the part of the State; and, as the grant may be withdrawn, it may be qualified by a tax. But if there is no succession, or if the succession has fully vested, or has passed beyond dependence upon the continuing of the State's permission or grant, an attempt to levy a tax under the power to regulate succession would be an attempt to appropriate property in a way which the Fourteenth Amendment has been construed to forbid. No matter what other taxes might be levied, a succession tax could not be, and so it has been decided in New York. *Matter of Pell*, 171 N. Y. 48, 55; *Matter of Seaman*, 147 N. Y. 69.”

In the same opinion, on page 482, the Justice added:

“The ground upon which this tax is imposed is, I repeat, the right of the State to *regulate* or if it sees fit, to *destroy* inheritances. If it might not have appropriated the *whole* it cannot appropriate any *part* by the law before us.”

The majority of the court were of opinion that the tax could be sustained in the case then before the court, for the reason that, although the power was *created* prior to the act, it was *exercised* subsequent to the enactment of the law imposing the tax upon such exercise. Nothing in the majority opinion in that case, nor, so far as we know, in any other decision of the court, is incon-

sistent with the view thus tersely expressed by Mr. Justice Holmes, that a succession tax cannot be levied except where there is a succession and when some element or step necessary to *complete* it is still wanting when the tax law goes into effect. We believe this view to be well founded and to be sustained by all adjudged cases.

The trust deed from Augusta Dickel to the Detroit Trust Company having been executed and delivered in April 1915, and the title having *then* passed from her and vested in it, we respectfully submit that it was not competent for Congress at a later date to appropriate the property by virtue of a later law. Neither was it competent for the Congress, upon the like pretext, to appropriate any part of that property.

Counsel for defendant will no doubt contend that congressional power of taxation is unlimited in that "uniformity" means merely geographical uniformity. We do not contend that the "uniformity" clause of the Constitution aids us, but we do insist in view of the Supreme Court decisions above cited, that Congress cannot levy the arbitrary tax concerned in this case because it is outside the scope of taxation and contrary to the Fifth Amendment.

(i) *No court, except the lower courts in this case, has ever upheld a retrospective inheritance tax upon absolute vested transfers.*

It is not claimed by the learned judge who delivered the opinion of the Circuit Court of Appeals that any such tax levied upon vested transfers pursuant to a law retroactive in character has been adjudged valid. The reasoning upon which it is sought to uphold such taxation is altogether by analogy. A case which the court below supposes to be analogous is that of transfers intended

to take effect in possession or enjoyment at or after the death of the grantor. Thus it is argued (Trans. 235-236):

"The evident theory of the statute is that transfers intended to take effect after the death of the grantor, as well as those made in contemplation of death, are equally testamentary in character. . . . Congress has accordingly included the two classes of transfers in one and the same section and subjected them, so far as terms go, to precisely the same treatment. In our opinion a transfer intended to take effect in possession or enjoyment after the grantor's death would under this statute be taxable, although made before the passage of the act. *Wright vs. Blakeslee*, 101 U. S. 174, 176. The natural inference would be, in the absence of substantial evidence to the contrary, that the same result was intended as to transfers made in contemplation of death."

We confess that we are unable to follow this reasoning. We do not dispute that gifts in contemplation of death made after the enactment of the law may be taxed. But the court in the quotation above made is not dealing with such cases. It is dealing with the case of an absolute gift alleged to have been made in contemplation of death *before* the enactment of the law, and at a time when such gift was tax-free. Its reasoning is this: the court is of opinion that "a transfer intended to take effect in possession or enjoyment *after* the grantor's death would, under this statute, be taxable, although made before the passage of the act", and hence concludes that a transfer made in contemplation of death, although wholly vested and taking effect in possession and enjoyment *before* the passage of the act, is likewise taxable. This is a *non-sequitur*. We do not concede that a transfer intended to take effect in possession or enjoyment after the grantor's death is taxable under this statute, even though made before the passage of the act. That precise question is involved in other cases now pending in this court, and

will be argued by other counsel. We call attention, however, to the fact that, if such transfers should be held taxable, it is not to be inferred therefrom that transfers absolute in form and fully completed before the passage of the act are also taxable, even though made in contemplation of death. Indeed, the very reason why the Circuit Court of Appeals holds transfers of the other class now under consideration to be taxable is that the same *do not take effect until after the grantor's death subsequent to the passage of the law*, whereas in the suit at bar the transfer took effect in the grantor's lifetime and *before the law was passed*.

In subdivision (a) of this division of our brief we have shown that, under Michigan laws, the full legal and beneficial title under the deed of April 21, 1915, executed by Mrs. Dickel, vested at that time in the Detroit Trust Company and the beneficiaries respectively. The District Judge so conceded (Trans. 160-161, 163-164); nor is the correctness of this ruling questioned by the Appellate Court (Trans. 236). The authorities cited in subdivision (a), therefore, serve to differentiate this case from *Wright vs. Blakelee*, 101 U. S. 174, 176, on which the Court of Appeals relies (Trans. 236), for that case passes upon the ground that the remainder, the transfer of which was there taxed, did not take effect until *after* the passage of the taxing law. It there appeared that Huntington died in 1846, leaving a will whereby he devised certain real estate in trust to receive the rents and profits, and apply the same to the sole and separate use of his daughter Henrietta for her life, and at her decease, if she should leave issue surviving, the testator gave and devised the real estate to such issue absolutely and in fee. On June 30, 1864, a Federal Inheritance Tax Law took effect, which in section 127 expressly taxed "every

past or future disposition of real estate by will, * * * by reason whereof any person shall become beneficially entitled, in possession or expectancy, to any real estate * * * upon the death of any person dying after the passage of this act." The daughter Henrietta died in September, 1865, leaving children her surviving. Mr. Justice Bradley said for the court (pp. 176-177):

"At her death in 1865 those children did 'become beneficially entitled in possession', and every condition of the law was fulfilled. There was a 'past' 'disposition of real estate by will', 'by reason whereof' the children of Henrietta Wright became 'beneficially entitled in possession' to the property devised 'upon the death of [a] person dying after the passage of this act'. We think the case is directly within the terms and meaning of the act. Up to the moment of Henrietta Wright's death her children had no interest in the land except a bare contingent remainder expectant upon her death and their surviving her. *At her death it came to them* as an estate in fee in possession absolute."

The case of Wright vs. Blakeslee, thus relied upon in the Appellate Court, differs, therefore, from the instant case in vital particulars. The act applied to past dispositions of real estate by will so far, and so far only, as to embrace the same if, by reason thereof, any person *should become beneficially entitled, in possession or expectancy*, upon the death of any person dying after the passing of the act. The remainder, the transfer of which was taxed, was a *mere expectancy* until the death of the life-tenant, which occurred subsequent to the enactment of the law. The children of Henrietta Wright, in other words, did not become beneficially entitled to any estate in the lands until the death of their mother after the passage of the law.

The Circuit Court of Appeals in its opinion (Trans. 236) says further:

“While the interests derived by a grantee under an absolute and immediately effective conveyance in contemplation of death are vested, the same is true of any irrevocable conveyance which takes effect in possession or enjoyment only upon the death of the grantor, *although in the latter case such vesting is merely in expectancy.*” (The italics are ours).

The court adds that it thinks Congress had power

“to tax both classes of conveyances, even if made before the passage of the Act.”

With all deference, we submit that the court here loses sight of the very distinction made in *Wright vs. Blakeslee* on which it relies. It ignores the marked difference between the case there shown of “a mere expectancy” (101 U. S. 178), and the case here exhibited, which is apparently conceded to disclose “an absolute and immediately effective conveyance” (Trans. 236), made before the passage of the act. If we correctly read *Wright vs. Blakeslee*, the decision of this court turns upon the point that, as Mr. Justice Bradley declares, “up to the moment of Henrietta Wright’s death her children had no interest in the land, except a bare contingent remainder expectant upon her death and their surviving her” (101 U. S. 177). If it had appeared that Henrietta Wright’s children had acquired vested interests in the lands prior to the enactment of the Revenue Law of June 30, 1864, the reasoning of the court would have led to a decision contrary to that actually rendered.

In the court below counsel for the Government relied upon *Carter vs. Bugbee*, 92 N. J. Law, 390; but that does not aid them. It arose under the New Jersey Inheritance Tax Law. It was not claimed by the State that the gift there in question was taxable because made “in contemplation of death” of the settlor, but because “intended to take effect in possession or enjoyment at or after such

death." The transfer there under consideration was in trust to collect the income during the life of the settlor, and pay the same to him, and at his death pay over certain specified portions of the corpus to designated persons "if he (or she) shall survive the settlor". Further disposition was made of the subject-matter of the trust in case the persons primarily designated, or any of them, should not survive the settlor. The transfer was made before the passage of the law, but the settlor died after its passage. It was held by the court that, under the terms of the trust deed, the gift was a contingent one; that the right of the beneficiaries depended, not upon the death of the settlor, which, of course, was certain to occur, but on whether they survived him, an event which was not only uncertain at the time of the execution of the deed of trust, but remained in uncertainty until the death of the settlor. The transfer is therefore, adjudged taxable for the reason that the "*deed does not operate to transfer the title to such property until after the tax act comes into being.*" But while thus holding upon the facts of that case, the New Jersey Court made the precise distinction to which we have above adverted, saying:

"There is much force in the contention of counsel for the appellants that, where the trust deed passes to the beneficiaries a present vested interest in the subject of the trust, a transfer tax cannot be imposed upon it by virtue of legislation which has subsequently been enacted. It has been so held by the Court of Appeals of New York in the Matter of Pell, 171 N. Y. 48, and subsequently in the Matter of Lansing, 182 N. Y. 238."

The correctness of the above decision will not pass unchallenged, for undoubtedly it conflicts with decisions of other State courts under Inheritance Tax Laws. We merely point out that the case involved no question of taxing a prior vested estate; whereas the instant cause

is confessedly one in which the estate fully vested prior to any legislative enactment authorizing a tax. We proceed briefly to consider other cases which were claimed in the courts below to uphold the Government's position.

Moffit vs. Kelly, 218 U. S. 400, is a similar decision. In that case prior to the California inheritance tax law of 1905, Mrs. Moffit under the laws of California had an interest in the community property of herself and husband, but had no right to control or enjoy the same until her husband's death in 1906. The California Court held that the law taxed this coming into enjoyment of property upon Mr. Moffit's death *after the passage of the law*. This Court held, (p. 404) that the Constitution did not prevent a State from selecting for taxation "the vesting in complete possession and enjoyment by wives of their share in community property consequent upon the death of their husbands, and the resulting cessation of their power to control the same and enjoy the fruits thereof." This is far different from taxing a transfer vested in interest and in enjoyment and possession *prior* to the incidence of the tax as in the instant cause.

There is a class of cases to which defendant will no doubt refer where transfers in a sense were created prior to the enactment of the taxation statute but where as a matter of the law of property they did not fully vest in possession or interest until after the passage of the law. We shall refer to these cases briefly.

Orr vs. Gillman, 183 U. S. 278, *Chanler vs. Kelsey*, 205 U. S. 466, and *Crocker vs. Shaw*, 174 Mass. 266, are all cases in which a power of appointment created prior to the inheritance tax law was executed *after* the passage of the law. The tax was upheld solely upon the ground that the beneficiaries had no vested estate and no right of possession or enjoyment until the exercise of the

power of appointment after the law took effect. The courts found it necessary to determine this as a matter of the law of property before upholding the statute.

Minot vs. Treasurer, 207 Mass. 588, and *Burnham vs. Treasurer*, 212 Mass. 165 (which latter case defendant most strongly relied upon in the court below), are cases in which by failure to exercise a power of appointment, created prior to the taxing law, property vested in interest and possession *after* the passage of the law. The tax was upheld because the Massachusetts court found, as a matter of the law of property, that the estates did not vest until the failure to appoint. This was the principal point of discussion because the courts in these and the other cases above cited conceded that, if the estates were vested prior to the law, no tax could be levied. In *Matter of Lansing*, 182 N. Y. 238, where as a matter of property law, the New York court held that a remainder over in default of appointment was vested, the tax was held void. The difference between New York and Massachusetts courts is, therefore, solely a difference on questions of property law, the constitutional law question being held the same in both courts.

People vs. Carpenter, 264 Ill. 400, is another case which as a matter of property law held certain estates vested and others contingent. In so far as estates were held to be vested prior to the taxation statute, the statute was held to be unconstitutional, the court making the same distinction that we do in the instant cause. The New York Court of Appeals in *In re Seaman*, 147 N. Y. 69, 77, clearly points out that a tax law covering gifts made prior to its enactment can lawfully cover only gifts conditioned upon taking effect upon the death of the donor after the law, i. e. true gifts *causa mortis*.

Counsel for defendant in the court below relied strong-

ly upon *Patton vs. Brady*, 184 U. S. 608, in which case tobacco in the hands of dealers for sale was subjected to a second excise tax after it had under a prior law been taxed before. The court in that case (p. 623) upheld the right to levy such an excise tax solely because the tobacco had not yet reached the consumer, and the sale which was taxed had not yet occurred. This is far different from the purpose in the instant cause to place an excise exaction upon a vested transfer, when the privilege taxed had been exercised long prior to the statute. We know of no authority which affords the slightest encouragement to the judgment in the court below.

III

The tax cannot be defended upon the interpretation given by the District Judge to the Act of September 8, 1916, to the effect that such Act merely taxes the "net estate" owned by Mrs. Dickel at the time of her death, but that the amount of such tax is measured also by the value of the transfer of April 21, 1915. Such interpretation is unauthorized by the statute, and, even if authorized, creates an unconstitutional exaction.

The assignments of error on which we rely in this division of our brief are those mentioned in divisions I and II, viz.: assignments of error 40, 41, 42, 51, 52, 53, 54, 64, 66, 67 (Trans. 262-270).

We have already seen that the trial judge was unwilling to decide the cause upon the ground on which the decision was placed in the Appellate Court (Trans. 161), and that the Appellate Court in turn expressly declined to consider the correctness of the construction put upon the Act by the trial judge (Trans. 239). We have shown that if the Estate Tax Law of Sept. 8, 1916, is so construed as to tax retrospectively an absolute transfer made

and completed long before the passage of the act, it violates constitutional principles, and hence the conclusion reached by the Circuit Court of Appeals is erroneous. We now purpose to show that the District Judge erred in the conclusion reached by him that, while the act merely taxes the "net estate" owned by Mrs. Dickel at the time of her death, the amount of the tax is, nevertheless, measured by the value of such "net estate", plus the value of the transfer of April 21, 1915. This opinion of the District Judge is unsupported by any prior decision and was not even based upon argument of counsel for the Government. It will be seen, upon consideration thereof, that its effect is in truth to tax the transfer completed prior to the passage of the act, despite the evident opinion of the District Judge that such transfer could not be subjected to a retroactive tax consistently with constitutional principles (Trans. 161-163).

(a) *The opinion of the District Judge.*

In the opinion upon the law of the case, rendered by the court (Trans. 160-165), and upon which the motion for directed verdict was denied, it was conceded that "the transfer or creation of the trust was a transaction completed more than a year before the tax law went into effect" (Trans. 160); that "Mrs. Dickel reserved in the trust conveyance no right or control or possession or enjoyment of the trust fund, or the income derived therefrom" (Trans. 160-161); that "the title to the trust fund was vested absolutely in the trustee, and the rights of the beneficiaries under the trust apparently became fully vested at the time of the execution and delivery of the trust conveyance." (Trans. 161.)

The court then noted the argument of plaintiff, that no power resided in the Congress to levy a tax retrospectively upon that transfer, and that the attempt to

levy the tax upon that transfer was violative of rights which are protected by the Federal Constitution (Trans. 161). But it was ruled that plaintiff's argument failed, because the tax here in controversy was not imposed upon the transfer of the trust fund by Mrs. Dickel to the Detroit Trust Company (Trans. 161-162).

In support of this conclusion, it was said (Trans. 161) that the term "net estate" occurs twice in the opening sentence of Section 201, but that the term is not used with the same meaning in both instances; that the context shows quite clearly that the "net estate" first mentioned is merely an important and essential element of the measure of the tax, while the other is the actual "net estate" of the decedent upon the transfer of which the tax, so measured, is to be levied.

The court thereupon reached the conclusion (Trans. 162), that the tax was by section 201 laid "upon the transfer of the net estate existing and belonging to the decedent at the time of her death," while sections 202 and 203, which covered transfers in contemplation of death, did not tax such transfers but merely provided "for the ascertainment of the measure and thereby the amount of the tax which shall be imposed upon such *net estate*, regardless of its amount or value."

The court (Trans. 162-163) refused to consider what would occur if a decedent had conveyed away *all* property prior to death or whether Sec. 209 of the Act, which clearly purported to place a tax upon transfers in contemplation of death and was, therefore, contrary to the court's interpretation of the law, was constitutional, holding that if section 209, when applied to transfers prior to the Act, "should be declared unconstitutional, the other provisions of the statute would not be affected" (Trans. 162).

The opinion of the District Judge appears to concede (Trans. 163) that, if Mrs. Dickel, prior to her death, had transferred *all* of her property, there could be no tax because there would be nothing upon which it could be assessed. His argument is that, even in such case, no unconstitutional inequality would be created, because the statute acts alike upon all estates of the same character and in the same situation, and that is all that is required. Whether the statute, as interpreted by the District Judge, does act alike upon all estates of the same character and in the same situation we shall consider shortly. We now direct attention to the circumstance that this reasoning of the District Judge to uphold the tax necessarily intends that a valid tax could not be levied upon the transfer of April 21, 1915, made by Mrs. Dickel, but only upon the "net estate" remaining at her death, and hence is in flat contradiction of the conclusions subsequently reached by the Circuit Court of Appeals.

Examination of the opinion of the District Judge will show that he realized that, under his decision, "net estates," as defined by him, were taxed not according to *their* value, but according to the value of *prior* gifts vested in *third* parties before the statute, and that such taxation might create "gross inequality and injustice" (Trans. 162). But while not professing that such method of taxation possessed any element of justice, he avoided discussion of this issue by saying (Trans. 162), "courts may not inquire as to the advisability *or even the justice of taxes.*" This court will look in vain through the opinion of the court below (Trans. 160-165), for explanation of why, contrary to all principles of statutory construction, it was found necessary to give the term "net estate" different meanings when used in the same section of the law, or why it is necessary to disregard the clear

terms of the sections 201-203 and 209, and place upon them a forced or strained construction towards doubtful constitutionality instead of away from it, and so as to operate in effect retrospectively instead of prospectively, and in favor of the Government and not in favor of the tax-payer, and so as to create inequality rather than equality. We deny that the court is powerless to make inquiry or do justice in the instant cause, and submit with deference that an interpretation of these sections of the law according to their true intent and meaning will lead us out of those difficulties created by the interpretation adopted by the trial judge, the resulting injustice of which he deemed himself unable to remedy.

(b) *The interpretation of the law by the trial court is unauthorized by the terms of the Act.*

After careful reflection, we confess ourselves unable to perceive the distinction made by the trial court as to the different meanings of "net estate" in the same section of the law and are constrained to contend that the term is used in each instance with the same meaning. Unless "net estate" has two different meanings where used in the same sentence, the entire opinion of the court concededly fails. The section in question (Sec. 201) imposes a tax upon the "net estate" of every decedent dying after the passage of the Act; it declares that the tax shall be equal to the specified percentages of the "net estate;" and reference is made to Section 203 for the mode or manner in which the "net estate" is to be determined. It must be conceded that presumptively the term "net estate," wherever used in this section, has the same meaning, and we submit that it is a strained and unnatural construction which declares the term to mean one thing in one part of a sentence and another thing in another part thereof, and that, too, despite a

specific reference to Section 203 for the definition or determination of such meaning. The construction approved by the trial court is, therefor, not one lightly to be adopted.

In *Gillen's Case*, 215 Mass., 96, 98, it is said:

"Where words are used in one part of a statute in a definite sense, it may be presumed, in the absence of a plain intent to the contrary, that they are used in the same sense in other places in the same act."

In *Ryan vs. State*, 174 Ind. 468, 474, it is said:

"It is a rule of statutory construction that when the same word or phrase is used more than once in the same section of an act, and the meaning is clear as used in one place, it will be construed to have that meaning wherever used in said act or section, unless there is something therein to show that there is another meaning intended."

Substantially the same rule is declared in *Public Utilities Commission vs. Early*, 285 Ill., 469, 474, and *United States vs. Central Pacific Railroad Company*, 118 U. S., 235, 240.

The like rule applies where the same words are used in different acts of Congress, if both acts are in *pari materia*.

Reiche vs. Smythe, 13 Wall., 162, 165.

The tax in question is an excise tax. It is levied upon the transfer. From what has been said, it is obvious that two things with respect to this tax are established by Section 201:

First,—That the transfer upon which the tax is levied is the transfer of the net estate.

Second,—That, so far as relates to the amount of the tax, it is determined by the specified percentages of the value of such net estate.

The manner of arriving at the amount of the net estate is pointed out by the Act. The succeeding Section 202 undertakes to define the "gross estate" of decedent. It includes "the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated." This property embraces:

That described in sub-paragraph (a), which is the property left by decedent at his death.

Also that described in sub-paragraph (b), which is the property transferred by decedent "in contemplation of death," or by instrument "intended to take effect in possession or enjoyment at or after his death."

Also that described in sub-paragraph (c), which is property held jointly or in tenancy by the entirety.

The reason for embracing in the "gross estate" property held in joint tenancy or that transferred in contemplation of death or by instrument effective at or after death, is plain. It is to prevent frauds upon the estate tax law. If these provisions were not contained in the Act, many men would place property in the names of themselves and their wives jointly, or create trusts to take effect in remainder at their death, or would make conveyances when death was imminent, and thus avoid the payment of death duties upon their accumulations. Accordingly Congress *taxed such transfers* as part of the estate of a decedent, as, if made after the law took effect, they were substantially part of that estate and should be taxed as well as other parts thereof.

Section 203 then defines the "net estate." It does this by deducting from the value of the "gross estate" the funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses, etc.; also an exemption of \$50,000. The balance is declared to be the value of the "net estate" "*for the purpose of the tax.*" Not,

be it noted, for the purpose of *measuring the tax*, nor for the purpose of *designating the property* upon the transfer of which the tax is to be assessed. The declaration that such is the net estate "*for the purpose of the tax*" plainly intends for *all* the purposes of the tax law.

The term "net estate" is used many times in Section 201. In those clauses of the section relating to the amount of the estate, the phraseology in each instance is "*such* net estate." These words obviously relate to the preceding words of this paragraph, in which reference is made "to the following percentages of the value of the net estate" and to the tax "imposed upon the transfer of the net estate of every decedent dying," etc. Reference to this portion of Section 201 indicates that the law-makers are unconscious that the term "net estate" to which the word "such" thus relates back, has no fixed or certain meaning, and we respectfully submit that consideration of the language of this section as a whole, as well as consideration of the succeeding sections 202 and 203, leaves no room for the claim that the term "net estate" is used sometimes with one meaning and sometimes with another. In each case we insist it means the "gross estate," as defined in Section 202, less the expenses, debts, losses, etc., and exemption specified in Section 203. It follows that if any part of such estate was transferred at a time when the law authorized no tax in respect thereof, no such tax can now be collected. The trial judge said in his opinion (Trans. 162):

"It seems entirely clear that Section 201 imposes the tax upon the transfer of the net estate belonging to decedent at the time of his death, while Sections 202 and 203 provide for the ascertainment of the measure, and thereby the amount of the tax which shall be imposed upon such net estate, regardless of its amount or value."

We submit that reference to the reason of the law, as well as to the letter of the law, will show this view to be erroneous. If it be true that Section 201 imposes the tax *only* upon the transfer of the net estate belonging to the decedent at the time of his death, as the trial court, in the hurry of the jury trial (which Judge Sessions himself deplored. Trans. 160), thus declared, it follows that *no* tax can be imposed upon the transfer unless there be estate "*belonging to the decedent at the time of his death.*" Such rule would be fatal to the successful operation of the taxing statute, and hence on no account should receive the approval of this court, if any other interpretation is reasonably open for adoption.

Under the rule thus declared, the door is thrown wide open to frauds and evasions of the tax laws. One whose death is impending has only to execute a transfer of *all* his property, even though it be long after the passage of the law and with intent to evade it, and there being then no estate "*belonging to the decedent at the time of his death*" no tax can be levied or collected.

This interpretation is in defiance of the literal terms of Section 202, which declares that

"the value of the gross estate of the decedent shall be determined by including the value *at the time of his death* of all property, real or personal, tangible or intangible, wherever situated, * * * to the extent of any interest therein of which the decedent has *at any time* made a transfer * * * in contemplation of * * * death."

This interpretation is likewise in defiance of the spirit of the law. The obvious design of the law is to put a transfer "*in contemplation of death*" made after the passage of the Act, upon precisely the same footing as a transfer by will or intestacy, made after the passage of the Act. The reason is clear. The property passes

from the dead or dying to the living, and the right of the living to receive from the dead or dying is the legitimate subject of that excise commonly denominated as a "succession tax." By the provision of Section 202, whether the property passes by will or by intestacy or by transfer in contemplation of death, its value is to be computed as of the time of the death of decedent. This makes additionally clear the endeavor of Congress to put transfers in contemplation of death upon the same basis as transfers by will or intestacy.

That we truly state the purpose of the Act of Congress in this regard is shown by reference to the proceedings in the House of Representatives when the bill was up for passage. (See Vol. 53 Cong. Rec., p. 10, 729). Mr. Kitchin, the author of the bill, and the then Chairman of Committee on Ways and Means, stated, upon the floor of the House, (as we have heretofore pointed out) that in two-thirds of the States having inheritance tax laws a tax was placed upon transfers made in contemplation of death, and that if such provision was not inserted, great frauds could be perpetrated upon the Estate Tax Law.

If the interpretation placed by the District Judge upon the taxing act is correct, the result will be extremely disastrous to the United States, for the reason that it will permit estates entirely to escape taxation in the event that a decedent conveyed away *all* his property prior to his death. This inevitably results from the view expressed by him (Trans. 162) that, while measured by something greater, the tax is imposed only "*upon the transfer of the net estate existing and belonging to the decedent at the time of his death.*" If this be true, counsel for one about to die has only to advise him to convey to near relatives *all* his property and the transfer will be free from tax, for there will

then remain no "estate existing and belonging to the decedent at the time of his death." The opinion of the District Judge, if upheld in this Court, points out, therefore, an easy method of defeating the purpose of the Congress in enacting the Estate Tax Law. This we urged at the trial, but in the District Court no weight was given to this argument, the Judge merely saying that "even in such case, no constitutional inequality would be created;" that "this statute acts alike upon all estates of the same character and in the same situation, and that is all that is required" (Trans. 163).

Upon the trial the counsel for the Government did not seem concerned that there thus existed an easy method of defeating the purpose of the law, nor did they disclose that such a result was undesired by the United States. Shortly thereafter we ascertained, however, that in the case of *Levy vs. Wardell*, then pending in the United States District Court for the Northern District of California, and now pending for argument in this court, the very question thus put by us to the trial judge has in fact arisen; and that the Government has in that case taken a position wholly inconsistent with the view expressed by the District Judge and thereafter adopted by the Government in its argument in the instant cause.

In *Levy vs. Wardell* it appears from the complaint that in 1902 a mother transferred 22,320 shares of stock in the Levy Estate Corporation to her children, reserving the income for her life, and that she died after the passage of the Act of September 8, 1916, leaving *no* estate whatever to pass through probate. Inasmuch as there was no "net estate existing and belonging to the decedent at the time of her death" (to use the words of Judge Sessions, Trans. 162), the Commissioner of Internal Revenue, under section 209, taxed the donees of the

transfer directly. They paid the tax under protest and are suing for its recovery. Able counsel appear in that case and there is no occasion for us to discuss its merits. We remark, however, that, *for the purposes of Shwab vs. Doyle*, the Government adopts the novel theory of the District Judge that, while the tax upon Mrs. Dickel's estate is *measured* by the value of what she left at her death, plus the value of what she conveyed to the Detroit Trust Company before the passage of the act, it is *imposed* only upon the transfer of the estate belonging to Mrs. Dickel when she died. But, *for the purposes of Levy vs. Wardell*, the Government insists that the tax is *not* imposed upon the transfer of the estate belonging to Mrs. Levy at her death (for there was no such estate), but upon the transfer made by her to her children in her lifetime. Thus the Government blows both hot and cold and is not willing in any case, except the instant cause, to permit to stand the construction of the law given in the trial court, and thereby open the door for frauds upon the Government. If the Levy case is decided against the Government, it will be authority against the decision in the lower court in the instant cause, in that it will show that a transfer prior to the act is not taxable, despite the Government's contention that the same was made "in contemplation of death" and "intended to take effect in possession or enjoyment" at or after the death of the donor, which latter element is not claimed to exist in the suit at bar. Again: If the Levy case is decided in favor of the Government, it will not in any way militate against the position assumed by us in this cause; for such decision will not be made in the Government's favor unless this Court holds that the transfer is taxable because "intended to take effect in possession or enjoyment" after Mrs. Levy's death subsequent to the passage of the act. It

is impossible to render a decision in favor of the Government in *Levy vs. Wardell*, if this Court were to follow the rule declared by Judge Sessions, that the tax can be imposed only "upon the transfer of the net estate existing and belonging to the decedent at the time of her death" (Trans. 162); and a decision in favor of the Government in that case, if placed upon the ground that the transfer there in question did not "take effect in possession or enjoyment" until Mrs. Levy's death, and hence *subsequent* to the passage of the Act of September 8, 1916, would have no application to any question arising in this suit, where the transfer was absolute and vested and took effect in possession and enjoyment *before* the passage of the Act.

Let us now note the provisions of other sections of the Revenue Act.

Section 205 requires the executor to file a return showing the gross estate, the deductions allowed by Section 203, the value of the net estate, and the tax paid or payable thereon. Return must be made in all cases where the gross estate, at the death of decedent, exceeds \$60,000.00; and this notwithstanding the fact that the "gross estate" might, under Section 202, consist *wholly* of property transferred by decedent after the passage of the Act, in contemplation of death.

Under Section 207 it is the duty of the executor to pay the tax. If he fails to pay or pays too little, the amount of the tax, or of the balance so owing, is a lien upon the "entire gross estate" (excepting property *bona fide* sold), and including, of course, property transferred after the passage of the Act, in contemplation of death.

By express provision of Section 209, the tax, unless sooner paid in full, is made a lien for ten years upon

the gross estate of decedent, reckoning, of course, as part of such "gross estate" property transferred in contemplation of death.

The further and still more particular provision of this same section is that

"If the decedent makes a transfer of or creates a trust with respect to any property, in contemplation of or intended to take effect in possession or enjoyment, at or after his death (except in the case of a *bona fide* sale for a fair consideration in money or money's worth), and if the tax in respect thereto is not paid when due, the transferee or trustee shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a *bona fide* purchaser for a fair consideration in money or money's worth, shall be divested of the lien, and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a *bona fide* purchaser for a fair consideration in money or money's worth."

In the opinion of the District Court it is said that we are not concerned with the question whether the tax could have been collected from the trustee if it had not been paid by the executor; that neither the trustee nor the beneficiaries will be affected by the result of this litigation; that if that portion of Section 209 which creates a possible lien upon the property transferred and a contingent liability upon the part of the trustee or transferee should be declared unconstitutional, the other provisions of the statute would not be affected (Trans. 162).

We dissent from this view. The provisions of the statute referred to here are important because they bear upon the true construction to be given to this act as a whole, and on familiar principles the Act should be

so construed, if possible, that it may be upheld in all its parts. These principles the court entirely disregarded.

Even though the executor be primarily liable for the entire transfer tax, the circumstance that the trustee is made personally liable for the tax, so far as it is assessed in respect of the transfer made to him in contemplation of death, or to take effect at or after death, shows the intent to tax that transfer or to reckon the property embraced in it as part of the estate the transfer of which is taxed. Upon no other theory can the clause rendering the trustee personally liable for such tax be upheld. Plainly it would violate constitutional principles to declare by statute that the trustee is "*personally liable*" for a transfer tax if the transfer does not embrace or relate to property conveyed to the trustee, or in which he is concerned.

The same is true of the clause imposing a lien upon the property transferred by decedent in contemplation of death. That lien could not be imposed, consistently with constitutional principles, upon the property of the transferee, if the tax were not levied upon that transfer or upon a transfer of which that was reckoned as a part, but *only* upon the transfer of such property as was owned by decedent at his death. Yet plainly the intent of the law is to confer a lien in such case upon the property of the transferee. This intent is carried so far that in case any part of such property is sold by the transferee to a *bona fide* purchaser for a fair consideration, etc., the property so sold is declared to be "divested of the lien," and in that case a lien then attaches "*to all the property of such transferee or trustee,*" except such part as may be *bona fide* sold.

It is an elementary rule of interpretation that where there are two possible constructions of a statute, one of

which will give rise to grave doubt as to its constitutionality and the other avoids such question the latter will be adopted. We refer to the authorities cited at the end of Division I. hereof.

We are constrained to reach the conclusion that the interpretation so placed by the court below upon Section 209 does not merely give rise to grave doubt as to the constitutionality of this section, but rather shows that it is in plain violation of the provisions of the Fifth Amendment to the Federal Constitution. The interpretation for which we contend gives effect to all the provisions of the Act, including those of Section 209. That interpretation merely leads to the conclusion that the Act is not retrospective in character, and hence does not apply to transfers fully completed before the passage of the Act. It does follow, of course, as the logical result of the argument, that if the Act were held to be retrospective in character in so far as to apply the same to a transfer fully completed before the passage of the Act, it would be violative of Constitutional principles and could not be upheld.

We call attention to Section 200 as having an important bearing upon the correctness of expressions in the opinion of the court. The trial judge said (Trans. 162) that transfers made in contemplation of death—

“are to be considered solely for the purpose of determining the measure or amount of the tax, and not for the purpose of determining the property upon the transfer of which the tax is to be laid.”

On the same page of the Transcript it is further said that the statute—

“imposes the tax upon the transfer of *the net estate belonging to the decedent at the time of his death.*”

We respectfully submit that these expressions of opinion are contrary not merely to the spirit, but the

very words of Section 209. As we have already seen, it is there enacted that—

“if the decedent makes a transfer of . . . any property in contemplation of . . . his death, and if the tax in respect thereto is not paid when due, the transferee or trustee shall be personally liable for such tax, and *such property*, to the extent of the decedent’s interest therein at the time of such transfer, shall be subject to a like lien, equal to the amount of such tax.”

This makes it as clear as language can declare, that the tax is levied *in respect of the transfer in contemplation of death*, and that a lien is created upon “*such property*” so transferred. The very words of this Section 209, therefore, effectually dispose of the contention that the Act should be so interpreted as to declare that the tax is imposed upon no transfer save “*the transfer of the net estate belonging to the decedent at the time of his death.*” With equal clarity the quoted language of this section disposes of the suggestion that transfers made in contemplation of death are to be considered *solely* for the purpose of determining the measure or amount of the tax. It is made plain to a demonstration that transfers made in contemplation of death *are* to be considered for the purpose of determining the property in respect whereof the tax is to be laid. Not only is the transfer to be considered for the purpose of determining the property upon the transfer of which the tax is to be laid, but “*such property*” is expressly made subject to a lien for its payment.

It is further said by Judge Sessions that in the present case we are not concerned with the question whether a valid tax could have been imposed if the whole of Mrs. Dickel’s property had been included in the conveyance to the Detroit Trust Company and she had died possessed of no estate (Trans. 162). In a sense we agree

with this statement. Mrs. Dickel did *not* convey her entire estate to the Detroit Trust Company, and hence this illustration employed by plaintiff at the trial is of value in the instant cause only as it may serve as a test of the principle applied by the court in its decision.

It must be conceded, however, under all the authorities, that if the whole of Mrs. Dickel's property had been conveyed by her to the Detroit Trust Company *in April, 1915*, and she had died possessed of no estate, no tax could lawfully have been imposed in respect of the transfer, even if the conveyance had been made "in contemplation of death." Why? Because the transfer would have been fully completed before the passage of the Act, and hence, as shown by the adjudged cases, no estate tax could lawfully have been imposed in respect of such transfer, consistently with Constitutional principles. In April, 1915, Mrs. Dickel had the unquestioned right to transfer her property to others, and they the unquestioned right to receive the same, free from tax on the transfer, whether that transfer was or was not made in contemplation of death.

In case, however, the whole of Mrs. Dickel's property had been conveyed by her to the Detroit Trust Company "in contemplation of death," *after* the passage of the Act on September 8, 1916, and *before* her death on September 16, 1916, and she had died possessed of no estate, it is equally clear that an estate tax could lawfully have been imposed in respect of such transfer. Why? Because the property so transferred would have been "gross estate" of Mrs. Dickel within the definition given in the Act of Congress (See Sec. 202), and after the appropriate deductions were made under Section 203, the balance or "net estate" would have been taxable under

those provisions of the law framed to prevent evasions through the instrumentality of transfers "in contemplation of death."

In the case last specified the property transferred by Mrs. Dickel to the Trust Company might fitly be reckoned as part of "the gross estate of the decedent" for the purpose of the tax, because the law existing at the time of the transfer provided that it should be so reckoned and the transfer was made subject to that provision of law.

In the suit at bar the property transferred by Mrs. Dickel to the Trust Company cannot fitly be reckoned as part of "the gross estate of the decedent" for the purpose of the tax, because no law existed at the time of the transfer which provided that it should be so reckoned, and the transfer was made and became vested free from the burden of such tax.

We submit, therefore, by way of summary, that the interpretation placed, in the District Court, on the Act of September 8, 1916, is erroneous for the following reasons:

First. The word "net estate" used in Sec. 201 can have but one and the same meaning where used in the section.

Second. Section 201 and the other sections of the act indicate clearly that the tax is levied on the entire net estate, including transfers in contemplation of death, and not merely upon the net estate owned by a decedent at the time of his death, taking into consideration gifts in contemplation of death merely as a measure of the tax on the net estate.

Third. The trial court's decision leads inevitably to a holding that Sec. 209 is unconstitutional while our contention that the Act is prospective in operation makes

the entire statute valid, and the statute as a whole should be construed to be constitutional if possible.

Fourth. The ruling below in effect creates a retroactive tax upon vested estates in an unconstitutional manner, while principles of construction compel an interpretation that will remove even doubts as to constitutionality.

Fifth. The decision violates the rule that taxing statutes must be construed in favor of the tax-payer.

Sixth. The court below disregarded the principle that laws are to be construed if possible prospectively and not retrospectively.

Seventh. The judgment of the District Court creates an unjust and discriminatory tax whereby a tax is measured *not* by the value of what the tax-payer receives but by the value of what a *third person received absolutely prior to the law*, whereas settled principles of construction compel an interpretation if possible that will bring about fair and equitable results.

Eighth. The construction in the court below leads to a conclusion not within the purpose of the law, inasmuch as transfers in contemplation of death were included in the Act in order to prevent evasion of the tax, while in the instant cause, the vested transfer made prior to the Act could have had no such fraudulent purpose.

The reasons above set forth, we submit, are conclusive against the *interpretation* made in the District Court. Furthermore, as we shall next point out, the interpretation, if sustained, creates an *unconstitutional exaction*.

(c) *The interpretation of the District Court creates an unconstitutional exaction.*

It was said at the trial that a transfer of *some* property occurred under Mrs. Dickel's will, and that a tax can be legitimately imposed in respect of this transfer. We concede this.

The court then went a step farther and said, in substance, that while a tax cannot be imposed upon the transfer of \$1,000,000.00 of securities conveyed to the Detroit Trust Company, the tax imposed upon the transfer by will may be measured by the value of the property transferred by will, plus the value of that transferred by the deed of trust (Trans. 162).

We respectfully submit that this is merely another way of imposing a tax upon the transfer by deed of trust, as well as upon the transfer by will. Or perhaps it is more accurate to say that it is an insistence that, for the purpose of the tax, the \$1,000,000.00 of securities conveyed to the Detroit Trust Company shall be reckoned as part of "the gross estate of the decedent", upon the transfer of which a tax is imposed, notwithstanding the fact that when the securities were transferred no law authorized the imposition of a tax on their transfer or their inclusion in "the gross estate of the decedent" for the purpose of the tax.

We have already called attention to the statement in the opinion of the court (Trans. 162) that—

"Sections 202 and 203 provide for the ascertainment of the measure, and thereby the amount of the tax which shall be imposed upon such net estate *regardless of its amount or value.*"

We beg to be permitted strongly to express our dissent from the view that this Act of Congress imposes a tax upon the net estate of decedent, *regardless of its amount or value*. We cannot believe it to be the intent of the Congress to authorize the imposition of a transfer tax, regardless of the amount or value of the property transferred. Neither can we believe the grant or exercise of so arbitrary a power to be consistent with the fundamental law of the land.

While the tax is imposed not upon the property itself, but upon the transfer, and hence is an *excise* tax, not a

direct tax, we contend that it is clear that the amount of the tax is determined by the amount of the net estate. Section 201, indeed, expressly declares that a tax "*equal to the following percentages of the value of the net estate*, to be determined as provided in Section two hundred and three, is hereby imposed upon the transfer," etc.; and, as we have seen, under that section the "net estate" is determined by deducting from the value of the "gross estate" the expenses, claims and losses therein specified.

By the express provision of the Act, therefore, the amount of the tax imposed upon the net estate is proportioned according to the value of the net estate; and it is no departure from this rule when the Congress determines, as in effect it does in Section 202, that the "gross estate" from which deductions are made in order to arrive at the amount of the "net estate" shall be deemed to include property transferred "in contemplation of death," for the purpose of evading the tax.

The question for decision in the instant cause, therefore, is whether, in determining the amount of the "gross estate," the revenue officers are justified in reckoning as part thereof the value of property transferred at a time when no law authorized the imposition of a tax; and we respectfully insist that nothing in the statute justifies such construction of it, and if such construction were justified, the Act would violate the provisions of the Fifth Amendment.

It is no answer to say that the executor is primarily liable for the tax. The Act is grossly discriminatory, and, therefore, void, if it be construed to impose a tax upon the executor in respect of the property transferred, so computed as to include in the estate, upon the trans-

fer of which a tax is imposed, the value of securities transferred to the Detroit Trust Company at a time when there was no tax.

Let us note the features of gross discrimination as applied to the facts of this case. Mrs. Dickel held approximately \$800,000.00 of property at her death (Trans. 162), and there was imposed an estate tax of \$31,242.12 (Trans. 3). The exact value of the gross estate, as fixed by the Commissioner, was \$855,596.39 and the net estate, \$804,842.24 (Trans. 3). But it has been adjudged that the estate must be taxed \$56,546.41 additional, or \$87,788.53 in all, because a transfer, not taxable under existing law, was made in April, 1915, and the value of the securities so transferred is embraced in "the value of the gross estate of decedent" under Section 202. It is obvious that there is thereby cast upon Mrs. Dickel's estate an additional burden of \$56,546.41, because of a transfer which, under all the authorities, is not taxable at all and would not have been taxable even though it had embraced the entire of Mrs. Dickel's property. The estate of another decedent dying on September 16, 1916, and leaving property valued at \$800,000.00—equal in amount to that left by Mrs. Dickel—would be taxed only \$31,242.12.

Again: the beneficiaries in the deed of trust obtained thereby \$1,000,000.00 of securities. But the tax in respect of *this* transfer—or to phase it somewhat differently, the tax upon the transfer of the "net estate," so far as the same is increased by adding thereto the value of these \$1,000,000.00 of securities—is paid by the executor and comes out of the residuary legatee, not out of the beneficiaries under the deed of trust. This is contrary to the intent of Congress in enacting this law.

In Division I. of this brief we have referred to the debates in Congress upon this subject. It was there

urged that, under the proposed law, the estate tax would be taken out of the net estate before distribution, and that if the decedent desired a particular beneficiary to pay the tax, so far as it was assessed in respect of the legacy or devise to such beneficiary, he could so provide by will. See subdivision (j) of Division I.

By the interpretation placed by the trial court upon this Act, this privilege is denied to Mrs. Dickel. The transfer of April 21, 1915, being fully completed some seventeen months before the passage of the Act, there is no way in which the beneficiaries under the deed of trust can be burdened with any portion of the estate tax; nor was it within the power of Mrs. Dickel, by codicil to her will, made after the passage of the Estate Tax Law, and prior to her death, to impose upon the beneficiaries under the deed of trust any portion of the estate tax which her executor has been compelled to pay. Had she known, when the deed of trust was executed, that this Estate Tax Law would thereafter be passed by Congress, it may be that she would have desired to reduce the amount of the property transferred to the Detroit Trust Company, in the sum of \$56,546.11, the amount of the tax which the executor is now compelled to pay in respect of these securities. By the interpretation placed by the District Court upon the statute, this privilege is denied her.

It is stated in the opinion of the District Judge (Trans. 162), that "courts may not inquire as to the advisability or even justice of taxes." We do not contend that it is within the power of the courts to overthrow a scheme of taxation adopted by the Congress, because it taxes some objects and leaves others untaxed. But we cannot believe that the courts are without concern as to the justice of a given scheme of taxation. The justice or injustice of the tax sought to be upheld

has an important bearing on the construction which will be given by the courts to the taxing statute, as we have pointed out in the preceding subdivision (b) and also in Division I.

When, as in the instant cause, the interpretation placed upon a statute creates gross inequality and discrimination, and makes an exaction with respect to a transfer not based on its value but on the value of a prior transfer vested in third persons, then, we submit, the gross injustice of the law is such as properly to come within the purview of a court of justice and to cause such a court to declare the law, if so interpreted, unconstitutional, as not creating a tax at all, within the powers of Congress, but as constituting in fact a deprivation of property without due process of law and taking of property without compensation in violation of the Fifth Amendment.

In support of our argument in this subdivision (c) we refer to decisions of this and other courts cited in the preceding Division II. of this brief. We rely upon *Knowlton vs. Moore*, 178 U. S. 41, as expressly refuting the decision of the District Judge that, while the tax is levied upon the estate owned by Mrs. Dickel at her death, it may properly be measured by the value of that estate, plus the value of the property embraced in the deed of April 21, 1915.

In that case the Federal Estate Tax Law of 1898 was under consideration in this court, and it was argued that the act should be so interpreted as to tax each separate legacy by the rate determined, not by the amount of the legacy, but by the amount of the whole personal estate left by the deceased. In the opinion of the court Mr. Justice White said (pp. 76-77):

“Granting, however, that there is doubt as to the construction, in view of the consequences which must

result from adopting the theory * * * we should be compelled to solve the doubt against the interpretation relied on. The principle on which such construction rests was thus defended in argument. The tax is on each separate legacy or distributive share, but the rate is measured by the whole estate. In other words, the construction proceeds upon the assumption that Congress intended to tax the separate legacies, not by their own value, but by that of a wholly distinct and separate thing. But this is equivalent to saying that the principle underlying the asserted interpretation is that the house of A, which is only worth one thousand dollars, may be taxed, but that the rate of the tax is to be determined by attributing to A's house the value of B's house, which may be worth a hundred-fold the amount. The gross inequalities which must inevitably result from the admission of this theory are readily illustrated. Thus, a person dying, and leaving an estate of \$10,500.00, bequeath's to a hospital ten thousand dollars. The rate of tax would be five per cent., and the amount of tax five hundred dollars. Another person dies at the same time, leaves an estate of one million dollars, and bequeaths ten thousand dollars to the same institution. The rate of tax would be $12\frac{1}{2}$ per cent. and the amount of the tax \$1,250.00. It would thus come to pass that the same person, occupying the same relation, and taking in the same character, two equal sums from two different persons, would pay in the one case more than twice the tax that he would in the other. In the arguments of counsel tables are found which show how inevitable and profound are the inequalities which the construction must produce. Clear as is the demonstration which they make, they only serve to multiply instances afforded by the one example which we have just given."

"We are, therefore, bound to give heed to the rule, that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute. * * *

"It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

The situation above condemned is identical to this case. Here under the trial court's view the "rate of the tax" on the transfer of \$800,000.00 is by "*an arbitrary provision*" (if the construction below is correct) "*fixed with reference to the sum of the property of another,*" viz.: the value of the transfer plus the sum of \$1,000,000.00 belonging to the beneficiaries of the trust of April 21, 1915, "*thus bringing about profound inequality.*"

Nor is it any answer that the tax would in the first instance come out of the residuary estate even if the transfer in contemplation of death was made after the enactment of the law. In such case, the donor, with the law in mind, could by regulating the size of the gift and by other provisions cause the incidence of the tax to occur as he thought equitable. This Mrs. Dickel could not do.

Except as decided otherwise in this case, inheritance, estate, succession and legacy taxes and duties have always been *ad valorem* taxes, i. e., based on the value of the transfer of the property taxed. Congress in 1797, when it enacted the first excise of this character, did so upon report of committee recommending "a duty of two per centum *ad valorem*." *Knowlton vs. Moore*, 178 U. S. 41, 50.

The District Court, however, taxed a transfer at a rate "regardless of its amount or value" (Trans. 162).

That such a classification is void, see also

Black vs. State, 113 Wis. 205.

The two cases of *Succession of Stauffer*, 119 La. 66, and *Herriott vs. Potter*, 115 Ia. 648, are also in point. In each of these cases a part of a decedent's estate had been administrated prior to the passage of inheritance tax laws and distributed, while a part remained undistributed. This undistributed part, under the decision of *Cahen vs. Brewster*, 203 U. S. 543, was of course taxable. The tax, however, was sustained merely with respect to the value of the part undistributed and not with respect to the part distributed before the law took effect.

We have already noted that in the opinion of the District Court it is conceded (Trans. 160-161) that the trust fund was vested absolutely in the trustee, and that the rights of the beneficiaries under the trust became fully vested at the time of the execution and delivery of the trust conveyance. We understand the District Judge to be of the same opinion as ourselves, that no power resided in Congress to levy a tax retrospectively *upon that transfer*, and that the attempt so to levy the same would be violative of rights protected by the Fifth Amendment to the Federal Constitution.

That the tax here in dispute is levied retrospectively is made clear by a simple statement of the controlling facts. In April, 1915, Mrs. Dickel transferred \$1,000,000.00 of securities to the Detroit Trust Company (Trans 179-188). The transfer was fully completed and was subject to no tax. Yet the value of that completed transfer is computed as part of the estate the transfer of which is taxed. No dialectic skill can disguise the fact that *because of that transfer* an additional tax of \$56,546.11 has been imposed upon Mrs. Dickel's estate and collected therefrom. If the Act of September 8, 1916, permits the levy and collection of an additional tax

in the sum of \$56,546.11, *because of what Mrs. Dickel did in April, 1915*, it necessarily operates retroactively. Hence it follows that the validity of the Act, as applied to this completed transaction, cannot be upheld. It is a deprivation of property without due process of law. It is a taking of private property for public use without compensation. It is, therefore, impossible, upon the reason of the rule, and within *Matter of Pell*, 171 N. Y. 48, and the other authorities cited in Division II. hereof, to uphold the Act if so construed.

(d) *There are no authorities upholding the interpretation of the District Court.*

It did not occur to counsel for defendant to suggest at the trial the construction of the statute later made by the trial court. At the argument of the motion for new trial some weeks thereafter (Trans. 176), and still later in the Circuit Court of Appeals, counsel cited authorities claimed to support the District Court's interpretation. We shall refer briefly to the principal cases on which the Government thus places reliance.

In support of Judge Sessions' decision, counsel cited the Stockdale case (20 Wall. 323) and the Brushaber case (240 U. S. 1), in which retroactive income tax laws were held valid, and it was urged that the income tax was measured by the income of the tax-payer for a past year. It suffices to reply that the tax was measured by the income of the taxable year. But in Division II., subdivision (f) of this brief, we have pointed out the difference between an income tax (which is a direct tax or tax on property) and the estate tax here in question, which is an indirect or excise tax, imposed upon the exercise of a privilege.

Again it is urged, in support of the opinion of the District Judge, that a tax upon the privilege of transmission and receipt may be measured with reference to

property which may not be directly taxed. Upon this point counsel cited *United States vs. Perkins* (163 U. S. 625), *Plummer vs. Coler* (178 U. S. 15), and *Snyder vs. Bettman* (190 U. S. 249). These cases respectively sustain a State tax upon a legacy to the United States; a State tax upon the devolution by inheritance of United States securities; a Federal legacy tax upon the transfer by will to a State or municipal subdivision thereof. But these cases hold merely that an inheritance tax is an excise tax and not a tax on property, which, since these decisions, is no longer in dispute. They hold it proper to measure the excise upon the transfer by the value of the property embraced *in such transfer*; but they do not hold it proper to levy such a tax retrospectively or to measure such a tax by the value of property received by a third person prior to the passage of the law.

Other cases cited by the Government concerned the Federal corporate excise tax of 1909: *Flint vs. Stone Tracy Co.*, 220 U. S. 107; *McCoach vs. Railroad*, 228 U. S. 295; *United States vs. Whitredge*, 231 U. S. 144; *Anderson vs. Forty-Two Broadway Co.*, 239 U. S. 69.

That law of 1909 expressly taxed the privilege of carrying on business in a corporate capacity and measured the amount of the tax by the "entire net income". There was, therefore, no question of interpretation involved, as in the instant cause. The argument of defendant on this point was, in substance, a reliance upon the following sentence in the opinion in *Flint vs. Stone-Tracy Co.* (220 U. S. 163), which underlies other expressions in that and other cases, viz.:

"The measure of such tax may be the income from the property of the corporation, although a part of such income is derived from property in itself non-taxable."

To this we reply that the excise law of 1909 expressly caused the tax upon the doing of business to be measured by the entire net income, while the estate tax law of Sept. 8, 1916, in clear terms, as we have pointed out in subdivision (b) does not cause the tax upon the estate of decedents to be measured by something else but expressly measures the tax by the value of the very transfer taxed. Furthermore, the entire income of a corporation is a just and proper way of measuring the value of its privilege to do business, and so no question of unconstitutionality arose upon that score. The corporation *itself* received *all the income* which was the *measure* of the tax. In the instant cause Mrs. Dickel's executor was compelled to pay, out of property which would otherwise have gone to the residuary legatee, a tax *not* based upon the value of that transfer or privilege but measured in large part (if the trial court's view is upheld) by the value of a transfer to *third persons* completed prior to the Act. Not only did no such improper classification appear in the corporate excise law, but also all questions of the retrospective character of a tax were likewise absent.

The quotation to which we have above referred from the corporate excise tax cases, is merely a statement of the inherent nature of excise taxation;—that it is not a direct tax on property and that the nature of the property itself, and whether it is taxable or not, are immaterial. This, of course, we concede.

It was further said that, though a tax may not be imposed upon exports, a tax may be legally imposed upon income derived from the business of exporting property. *Peck vs. Lowe*, 247 U. S. 165, was cited in support of this contention. This is merely a holding that a tax upon the income of an exporter is not a tax upon "articles exported from any State." We see no relevancy to

this discussion in that decision. It seems too clear for argument that when the Constitution forbade a tax on "articles exported from any State," it had in mind a direct tax upon such articles and upon such articles only, and did not intend to erect those engaged in export trade into a privileged class, free from future income tax and excise tax laws.

In this connection reliance was also had by the Government on *Maxwell vs. Bugbee*, 250 U. S. 525. In that case the inheritance tax law of New Jersey taxed estates of non-residents who owned some property in New Jersey, not directly proportionate to the value of the New Jersey property; but the amount of the tax was first ascertained as if the entire estate was in New Jersey and was then assessed at the proportion which the property in New Jersey bore to the entire estate wherever situated. Because of the graduation of the tax, this formula, expressly fixed by the law, in the case of large estates, taxed non-residents a greater amount with respect to property in New Jersey than residents having an equal amount of property in New Jersey but no property elsewhere. The majority of the court held the law constitutional, stating "when the State levies taxes within its authority, property not in itself taxable by the State, may be used as a measure of the tax imposed."

There was no question of interpretation of the statute involved. It clearly adopted the measure of taxation mentioned. Nevertheless Mr. Justice Holmes, with whom the Chief Justice, Mr. Justice Van Devanter and Mr. Justice McReynolds concurred, strongly dissented. It is fair to suggest that the case would have been otherwise decided if it had been not only possible, but in fact necessary from a fair construction of the statute, to interpret the law so as not to make the measure of the tax depend in part upon a non-taxable transfer. In that

case, however, the tax was levied upon the value of property actually received *after* the enactment of the law *by the tax-payer*, not upon the value of a *third person's* property received by the third person *before* the law, and the statute did proportion the tax to the value of the property, the transfer of which was within the power of taxation, although not quite in the same way, in a few exceptional cases, as in the case of resident decedents. In the instant cause, the additional tax paid under protest (if the District Court's view is sustained) was measured by the value of the prior transfer to a third person, itself not subject to tax, *and at the entire value of this non-taxable transfer*. Even had the Act of September 8, 1916, expressly allowed this, we submit such gross inequality would be unconstitutional. Certainly, a law which by its terms does *not* do so, should not be so construed as to reach such inequitable results.

A distinction between that case and the instant cause is shown by the majority opinion in these words:

"The transfer of certain property within the State is taxed by a rule which considers the entire estate in arriving at the amount of the tax. It is in no just sense a tax upon the foreign property, real or personal."

In the suit at bar the collector did not consider merely "*the entire estate*" in arriving at the amount of the tax. He considered also the transfer to the Detroit Trust Company, the property embraced in which was no part of that estate, having lawfully been severed therefrom at a time when no law authorized the imposition of a tax on the transfer. Furthermore, in the instant cause, as we have already seen, the additional tax imposed on Mrs. Dickel's estate is in its essence a tax upon the transfer made prior to the enactment of the Estate Tax Law.

In fact, *Maxwell vs. Bugbee, supra*, instead of supporting defendant in error's position, overthrows the decision of the District Judge in the instant cause; for the majority opinion stated that "attempted taxation must fail" if it imposes a tax "upon a subject matter within its jurisdiction in such a way as to really amount to taxing that which is beyond its authority." That is what occurred in the judgment of the trial court in this cause.

A decision of this court, later than any referred to by them, refutes the argument of counsel by the Government that a tax may be measured by something outside the taxing power and which has no proper relation thereto. We refer to *Wallace vs. Hines*, 253 U. S. 66. In that case this court held unconstitutional, as a violation of due process of law, a statute of North Dakota placing an excise tax upon the privilege of a foreign railroad corporation's doing business in North Dakota. The tax was based upon the total value of the stock and bonds of the corporation, proportioned upon the ratio which mileage in the State bears to total mileage. This was held to be an unfair basis, because mileage in other States cost more to build than upon the plains of North Dakota. Certainly, if this was a taking of property without due process of law and in no sense a proper tax, the tax sustained by the District Court in the instant cause is also invalid, because it did not even attempt to make any apportionment so as to exclude, in some way, the prior gift not within the taxing power, but based a tax upon the full value of this prior gift.

IV.

The deed of trust was not made by Augusta Dickel in contemplation of death and was not taxable under the Estate Tax Law. There was error in submitting this question to the jury.

The discussion of this subject at the trial in District Court and upon motion for new trial in that court and again in the Circuit Court of Appeals resolved itself into two parts:

First. The uncontradicted proofs show that the trust deed of April 21, 1915, made by Augusta Dickel was not made in contemplation of death, and it was, therefore, not taxable under the Estate Tax Law of September 8, 1916.

Second. Even if it be held that there was some evidence to go to the jury upon this head tending to show that the trust deed was made by Mrs. Dickel in contemplation of death, the definition given by the District Judge to the jury of the phrase "in contemplation of death" is in flat defiance of all judicial precedent and, as we respectfully submit, of the reason of the rule as well, and the instructions upon this subject require the reversal of the case.

These questions were argued in the Circuit Court of Appeals and the assignments of error presenting the same were overruled in that court (Trans. 239-246). The argument which we now make upon this subject is based upon assignments of error numbered 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 68, 69, 70, 71 (Trans. 219-226, 262-271).

(a) *The Statute.*

In the preceding divisions of this brief we have shown that the Act of September 8, 1916, is not retroactive in effect and does not by its terms cover gifts made prior to its passage, and that, if it could be construed to apply

to such gifts, it would be unconstitutional and void. If the statute, however, in terms did expressly refer to gifts made prior to its passage, and if an attempt to tax such vested interests were held constitutional, nevertheless, it is submitted that, upon the undisputed evidence, the statute would not embrace the deed of trust made by Augusta Dickel, for the reason that that deed of trust was not made in contemplation of death.

The provision of the Act of September 8, 1916, claimed to be applicable is section 202 which is quoted at length in division I. of this brief. We shall proceed to consider the history and meaning of that phrase of this section now supposed to be pertinent.

(b) *The deed of trust was not intended to take effect in possession or enjoyment at or after the death of Augusta Dickel.*

It will be noted that the phrase used in the statute is "*in contemplation of* or intended to take effect in possession or enjoyment at or after his death." We direct attention to the circumstance that the transfer now under consideration does not come within purview of the statute as a transfer "*intended to take effect in possession or enjoyment at or after the death*" of the grantor; and, unless there was evidence tending to show that it was made "*in contemplation of death*," it was error to submit the case to the jury.

The distinguishing feature of this deed of trust of April 21, 1915, is that it is *absolute in form and took effect immediately*. Mrs. Dickel was possessed of more property than was required for her personal use. She had been accustomed to provide generously for six of her nephews and nieces (Trans. 76). Their father, Victor E. Shwab, had created for Mrs. Dickel the greater part of her fortune. She determined to make secure provision for her nephews and neices by conveying to a

trustee a portion of her property for which she herself had no need, the income to go to their father during his life, and subject to distribution by him as he deemed best, and after his death directly to the six nephews and nieces and their issue during the life of said nephews and nieces and the life of the survivor of them, the issue of her nephews and neices ultimately to take the entire of the principal of the trust fund. It was a far-seeing plan, conceived and executed in her lifetime for the benefit of those to whom Mrs. Dickel was tenderly attached. It was not testamentary in character, for it took immediate effect. It did not dispose of Mrs. Dickel's estate, for she reserved for herself much more than was ample for her own needs.

To accomplish her purpose, Mrs. Dickel stripped herself of all title or interest, legal or beneficial, in the securities so placed with the Detroit Trust Company in trust. She did not reserve to herself any income or life estate or power of revocation or appointment, nor did she reserve any control whatsoever over the trust fund. Forthwith upon the delivery of the instrument, the legal title to the property therein described passed from her to the Detroit Trust Company and vested in it (Exhibit E; Trans. 179-186).

By the terms of the trust deed, Victor E. Shwab is given an immediate vested right to the income of the trust fund for his life. He is given not only the title to the income, but immediate possession and enjoyment thereof. This was not conditioned upon whether or not Mrs. Dickel lived longer. Mr. Shwab came into immediate possession and enjoyment of this income, independently of the death of Mrs. Dickel, and prior to her death (Trans. 183).

Subject to Mr. Shwab's use for life, the trust instrument created a vested remainder in the income of the

trust fund in the six beneficiaries therein named, their issue taking in the event of their death. Upon the death of the survivor of the six, their issue took the principal (Trans. 183-185). The instrument created, therefore, an absolute vested estate in the trustee and the beneficiaries under Michigan laws. See subdivision (a) of Division II. of this brief.

Thus it will be seen that the taking effect of this transfer or trust, either in possession or enjoyment, was in nowise dependent upon the death of Mrs. Dickel. It took effect immediately upon delivery and so far as possession or enjoyment of the fruits of the trust was subject to subsequent change, it was dependent upon the death of other persons, viz., Victor E. Shwab and the other six beneficiaries. Had Mr. Shwab died prior to September 16, 1916, while Mrs. Dickel was still alive, the other six beneficiaries would have come into possession or enjoyment during her life. If Mr. Shwab lives many years, the enjoyment of the other six beneficiaries, of the fruits of the trust, will be postponed accordingly.

We have adverted to the circumstance that the transfer was absolute. No one has power to terminate the trust prior to the deaths of Victor E. Shwab and the survivor of the other six beneficiaries. The express provision of the instrument is (Trans. 184):

“After the death of Victor E. Shwab this trust shall continue during the lives of the six following named persons (hereinafter referred to as the ‘beneficiaries’) and during the life of the last survivor of them.”

There is power to remove the trustee and appoint another, but that power is vested in Victor E. Shwab and George A. Shwab. Augusta Dickel had no such power, nor any voice whatever in the management or control of the trust. While paragraph X speaks of the termination of the agreement or the termination of the

trust, the context shows that this refers to the termination of the trusteeship of the Detroit Trust Company (Trans. 185). Paragraph XI of the deed makes plain that, when the trusteeship is so terminated by act of Victor E. Shwab and George A. Shwab, or the survivor of them, or by the act of the Detroit Trust Company in resigning, another Trust Company or corporation is to be appointed successor (Trans. 186).

It is, therefore, clear that the trust deed executed by Mrs. Dickel cannot possibly be considered as coming within the terms of the statute so far as the statute purports to cover transfers or trusts "intended to take effect in possession or enjoyment at or after her death." If any authority be needed, we cite *In Re Masury's Estate*, 51 N. Y. S. 331 (affirmed on opinion below, 159 N. Y. 532).

The trial judge agreed with this view. In his opinion on the law of the case he referred to defendant's insistence that there was evidence to go to the jury upon the question whether or not the trust deed created by Mrs. Dickel was to take effect in enjoyment or possession at or after her death, and stated that a careful consideration of the evidence in all its bearings convinced the court that there was not sufficient evidence to warrant the submission of that question to the jury (Trans. 163-164). But having thus disposed of defendant's contention in that regard, the trial judge held that there was sufficient evidence to require the submission to the jury of the other question, whether the trust was created by Mrs. Dickel "in contemplation of death" (Trans. 164), and he therefore denied the motion for directed verdict. (Trans. 165). This ruling was affirmed in the Court of Appeals (Trans. 244-246). This question we now argue. It is raised by plaintiff's motion for directed

verdict, and by requests to charge I. and II., Assignments of error numbered 40, 41 and 42 (Trans. 156, 160, 219-220, 262-263).

(c) *The phrase "in contemplation of death" was adopted from State statutes and with it the Congress adopted the interpretation theretofore placed on those words by the State courts.*

Some of the authorities hereinafter cited trace the origin or history of the phrases "in contemplation of death" and "to take effect in possession or enjoyment at or after death," and the relation of such phrases to each other in Inheritance Tax Laws.

In this connection we make reference to the language of the court in *Keeney vs. New York*, 222 U. S. 525. In this case a resident of New York, being in good health, executed, in Kings County, a deed, whereby she conveyed a cattle ranch in Texas and certain stocks and bonds to the Fidelity Trust Company of Newark, New Jersey, in trust, to hold the same during her lifetime, and to divide the net income equally between herself and her three children, two of whom resided out of the State of New York. The deed further provided that after her death the trustee should pay the entire income or transfer the property to her children, or their issue. In the deed she reserved the right to revoke or alter the whole, or any part, of the trust conveyance, at any time after six months' notice in writing. The transfer was held subject to inheritance tax in New York, so far as it related to the interests acquired by the children in the stocks and bonds, under deed intended to take effect at the death of the grantor, and it was decided by this court that the imposition of such tax did not violate the Fourteenth Amendment in that it took the property without due process of law. In considering the questions involved, the court adverted to the fact that the grantor

created a trust for her own life and reserved a beneficial interest to herself. On pages 535-536 Mr. Justice Lamar said:

"Where the grantor makes a transfer of property to take effect on the death of a third person, it might, under the ruling in *Scholey vs. Rew*, *supra*, be taxed as a devolution or succession. But under such an instrument the grantor does not retain the use and power during his own lifetime, the remainder does not fall in at his death, and such conveyances would not be so often resorted to as a means of evading the inheritance tax. 194 N. Y. 287. They are not so testamentary in effect as those transfers wherein the grantor provides that the property shall go to his children, or other beneficiaries, at and after his death."

"*The New York statute recognizes this difference. It imposes a tax on transfers by descent, or will, which take effect at the death of the testator; and then a tax upon transfers made in contemplation of death. It was but logical to take the next step, and tax transfers intended to take effect at or after the death of the grantor—even though that event was not actually impending when the deed was signed.*"

It being obvious that this transfer in the instant cause was not intended to take effect at or after the death of Mrs. Dickel, it remains for us to consider whether or not it comes within the terms of the act relating to gifts "in contemplation of death." These words were not in the Federal Inheritance Tax Law of 1898, although that act did contain a provision relating to transfers taking effect in possession or enjoyment at or after death. The words to which we now advert are found in some of the State statutes and were taken by Congress therefrom. Congressman Kitchin, the author of the Act (H. R. 16763), and also Chairman of the House Ways and Means Committee, which reported favorably upon the bill (House Report No. 922, Vol. 53, Congress-

sional Record 64th Congress, First Session, pp. 10372, 10470) made this clear on the floor of Congress when he was leading the debate in favor of the passage of the bill. Upon being interrogated as to why this provision was placed in the bill, Mr. Kitchin said (Congressional Record, p. 10729):

“I will say that two-thirds of the States that have an inheritance tax have substantially similar provisions, and if we did not have that provision in, the gentlemen can see what great fraud could be perpetrated upon the estate tax law.”

Debates in Congress may, of course, be referred to in order to assist the court in interpreting a statute. *Holy Trinity Church vs. United States*, 143 U. S. 457, 463-465. *Ex parte Farley* (C. C.), 40 Fed. 66, 69.

Inasmuch as the provision relating to gifts made “in contemplation of death” was adopted from state statutes, we shall refer to state decisions interpreting the words, which decisions had become part of the laws of such states prior to the passage of the Federal Estate Tax Act. In such situation, it is clear that the Congress adopted this phrase with the interpretation already placed on it by the State courts (See authorities cited in subdivision (h) of Division I. of this brief). In the light of the decisions there cited, and of the fact that the Federal Estate Tax Law relating to gifts “in contemplation of death” was adopted from State statutes, we come now to consider the interpretation placed on those statutes by the courts of the several States at the time of the adoption thereof by Congress.

(d) *The New York cases.*

The State of New York was among the first States in the Union to adopt an inheritance tax law. Its judicial decisions upon the questions arising under this law are

numerous and well considered. Many of the other States have adopted their statutes, in whole or in part, from the New York statute, and the courts of other States have almost uniformly cited New York cases in interpreting their own statutes.

The New York statute, in so far as it relates to gifts made "in contemplation of death," has been adopted in Illinois, Wisconsin, California, and some other States, and the Federal Estate Tax Law of September 8, 1916, is practically identical with it. The New York statute taxes transfers:

"when the transfer is of property * * * by deed, grant, bargain, sale or gift made in contemplation of death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death."

The succeeding provision of the New York statute taxes such transfers "whether made before or after the passage of this act;" but this clause was omitted from the Act of Congress of September 8, 1916. In examining the New York cases, it will be found that the courts of that State have applied the words "in contemplation of death" to gifts *causa mortis* or to cases in which, if there were gifts *inter vivos*, the same were accompanied by an intent to defraud the inheritance tax. The most usual definition of the phrase we believe to be that given in *In Re Baker's Estate*, 82 N. Y. S. 390 (affirmed on opinion below, 178 N. Y. 575). It is there said:

"This court has held that the words 'in contemplation of death' do *not* refer to that *general expectation* which every mortal entertains, but rather the apprehension which arises from some *existing* condition of body or some impending peril."

It is added:

"And this we believe is now the generally accepted definition of the phrase."

The adjudged cases in New York abundantly justify this statement.

In Re Seaman, 147 N. Y. 69, 77.

In Re Spaulding's Estate, 63 N. Y. S. 694. (Affirmed on opinion below, 163 N. Y. 607).

In Re Masury's Estate, 51 N. Y. S. 331. (Affirmed on opinion below, 159 N. Y. 532).

In Re Graves' Estate, 103 N. Y. S. 571, 573.

In Re Mahlstedt's Estate, 73 N. Y. S. 818.

Matter of Bullard, 78 N. Y. S. 491.

In re Palmer's Estate, 102 N. Y. S. 236.

In Re Beyer's Estate, 180 N. Y. S. 396.

In Re Hess Estate, 96 N. Y. S. 990, 991.

In Re Spaulding's Estate, 63 N. Y. S. 694, is instructive. In this case, after the passage of the Inheritance Tax Law in New York, the deceased, then about eighty-five years old, made gifts of \$1,500,000 in securities to his children, and died within a year and a half after the first gift, and ten months after the last gift. These gifts were held not to be taxable, inasmuch as they were not gifts *causa mortis*, with power of revocation and were not made *in extremis*. It was said in the opinion of the court (afterwards affirmed in 163 N. Y. 607, on the opinion of the court below) at p. 697 of 63 N. Y. S.:

"It may be assumed, considering the age of deceased at the time of his death, his enfeebled condition, the steady and continued failing of his physical power, and what he said to his son at the time the gifts were made, that the deceased knew he would not long continue to live; that death at most was not many years distant; and that he wished his three children to be the absolute owners and possessed of a part of his property before that event should take place; but there is no evidence tending to show that the gifts were made when the donor was *in extremis*, when he was dangerously ill, in danger of immediate death, in peril, afflicted with an acute

disease, or anything of the kind. He was simply an old man, feeble as the result of old age, and he must have known that he could not live many years longer; but whether a few months, one, two or five years, was not known to him and could not be determined with any degree of accuracy.

"Were the gifts in question 'made in contemplation of death' within the meaning of the statute? It will not be contended that a literal construction of the provision of the statute would be reasonable or was intended by the Legislature."

The court then gave a number of examples to show that the general contemplation of death which all persons have at all times was not what was meant by the statute.

On page 698 it is said:

"In the case at bar, as we have seen, there was nothing to indicate to decedent at the time the gifts in question were made that he was in immediate danger of death. The evidence only tends to show that he was an old man, somewhat enfeebled, gradually declining in physical power. Whether he was to live one, two or five years he did not know, and could not have known; that he was to die immediately or within a few days, he had no reason to expect; that he was to die within a few years, he knew to a certainty. As a matter of fact he lived a year and six months after the first gift was made and ten months after the second gift was made, and up to within two months of his death had never called or required the services of a physician."

Upon the above facts, the court held that the test to be applied was whether or not the gift was a gift *causa mortis*, that is, with power of revocation retained, making the gift ineffective until death, or whether it was made *in extremis*; and that the gift in question was not made "in contemplation of death" within the meaning of the New York cases, several of which were cited.

In Re Mahlstedt's Estate, 73 N. Y. S. 818. It here appeared that a decedent, during his last illness and

three weeks before his death, transferred certain stock to his wife, and at the same time made a will giving all his property to his wife. He had been told by his physician that when he recovered he would have to take a long vacation. The court held that the gift was not taxable as one made "in contemplation of death," saying (p. 820):

"The fact that he did die within about three weeks of the transfer, and that he died of the same illness with which he was afflicted at the time, has no bearing upon the question. The only point to be determined is whether the transfer was made *in contemplation of his impending death; and for the purpose of his defrauding the State of the transfer tax; for that is the essence of the matter, and there is no presumption that a man intends to commit a fraud of any kind.*

Matter of Bullard, 78 N. Y. S. 491. It here appeared that a gift of shares of stock was made by transfer in writing on the back of a certificate, and a delivery thereof by a person eighty-three years old, who continued in vigorous health until just before his death, three years later. It was held not to be a transfer "in contemplation of death," even though it appeared that there was no transfer on the books of the corporation, and that the donor continued to act as an officer of the corporation and received the dividends upon the stock. The decision was rested upon the point that the gift was not strictly a gift *causa mortis* and that there was no evidence of intent to defraud the State of the inheritance tax.

The case of *Keeney vs. New York*, 222 U. S. 525, indicates that the Supreme Court of the United States places the same interpretation upon this section of the New York statute as do the New York courts in the case *In Re Baker's Estate*, above cited, and does not consider the transfer made "in contemplation of death" unless

death was "*impending*" when the transfer was made. See quotation from opinion in that case, made in subdivision (c), *supra*. It is clear that if this court is to apply in the instant cause the definition given by the New York courts, the transfer made by Augusta Dickel to the Detroit Trust Company, by the instrument of date April 21, 1915, was not made "in contemplation of death." This is so for several reasons:

First.—That transfer was not a gift *causa mortis*. For a definition of that term we refer to 1 Bouvier's Law Dictionary, p. 924 (Rawle's Third Revision):

"*Donatio Mortis Causa*—A gift made by a person in sickness, or other immediate peril, who, apprehending his death as near, delivers, or causes to be delivered, to another, the possession of any personal goods, to keep as his own in case of donor's decease. 2 Bla. Com. 514."

Mrs. Dickel's death was not impending when this instrument was made. She was not then *in extremis*. The gift was not made conditionally to take effect only in the event of her death, nor did she reserve the power of revocation.

Second.—There was no intent to evade the Estate Tax Law. The trust deed was executed some seventeen months before the passage of this Estate Tax Law by Congress, and at a time when the passage of such act was not even proposed.

Third.—If Augusta Dickel in April, 1915, entertained any expectation of death, the undisputed proofs to which we have adverted abundantly show that it was merely that general expectation which every mortal entertains. She had no apprehension arising from any "existing condition of body," nor from any "impending peril," but expected to live for or beyond her allotted expectancy. She made the deed of trust not because she contemplated death, but because she expected to live, and,

being possessed of more than an abundance for her own needs, wished those near and dear to her to receive and enjoy in her lifetime some of the fruits of her superabundance.

In the opinion of the Circuit Court of Appeals (Trans. 240) it is said that the trial court's definition of the phrase "in contemplation of death" is not in conflict with any settled and controlling rule of construction, and that the decisions relied on by plaintiff in this suit do not completely and uniformly support the definition taken by us from *In re Baker's Estate*, *supra*. Proceeding then to discuss the cases adjudged in the several States, the Court of Appeals says that the New York decisions are not convincing. As a reason for this conclusion the court adverts to the circumstance that in the matter of *Seaman*, 147 N. Y. 69 (1895), there was a dictum to the effect that the expression "in contemplation of death" is confined to conveyances *causa mortis*, and that this is inconsistent with later decisions embracing within the phrase appropriate cases of gifts *inter vivos* (Trans. 241). The argument is that later decisions construing the phrase (among which *In re Baker's Estate* is one) were more or less influenced by earlier classifications (Trans. 241). But *In re Baker's Estate* (82 N. Y. S. 390), it will be noted, is not a case of gift *causa mortis*, but the case of an unconditional transfer executed by decedent about a year and a half prior to his death.

The further suggestion of the Court of Appeals (Trans. 241), seems to be that the case from which the definition for which we contend is taken, and the other New York cases on which we rely, are not wholly consistent with the *Crary* case (64 N. Y. S. 566, 568), where "the state of mind of the grantor," to use Judge Knappen's words, "was at least impliedly recognized." This court will perceive that the New York cases thus criti-

cized by the Circuit Court of Appeals were later in time than the Crary case to which it refers and that the Crary case is merely the decision of the Surrogate of Broome County. About the same time as the decision (reported in 64 N. Y. S.) of the above mentioned Surrogate there was decided *In Matter of Spaulding's Estate* (63 N. Y. S. 694), and the same was then taken to the Court of Appeals and affirmed on the opinion of the court below (163 N. Y. 607); *Mahlstedt's Estate* (73 N. Y. S. 818) was then decided; and still later *In re Baker's Estate* was decided in the Appellate Court (82 N. Y. S. 390) and then taken to the Court of Appeals and there affirmed on the opinion of the lower court (178 N. Y. 578). While the three New York cases last mentioned are referred to (Trans. 241) as not correctly expressing the New York rule, we call attention to the fact that, in a decision of the Supreme Court of New York, Appellate Division, made shortly before the argument of this case in the Circuit Court of Appeals, those three cases are cited by the New York court with approval (*In re Beyer's Estate*, 180 N. Y. S. 396-398). We also direct attention to the further fact of controlling importance that three cases to which we have above referred determining what is meant by the phrase "in contemplation of death" had definitely established the law of that State when the Congress adopted that phrase in 1916. Indeed, the Baker and Spaulding cases were recognized as correctly stating the law of New York only a few weeks before the Estate Tax Law of September 8, 1916, was enacted. *In re Reynold's Estate*, 163 N. Y. S. 803, 809.

The implication of the opinion in the Circuit Court of Appeals (Trans. 241) that we rely on earlier decisions of the New York courts which have been modified in some particulars by the later cases in that State is, therefore, precisely contrary to the fact. But if we are

to accept the rule as declared in the earlier case decided by the Surrogate of Broome County and cited by Judge Knappen (64 N. Y. S. 566, 568), the case of the defendant at bar is not aided. That decision declares that the statute was "intended to reach absolute transfers when made under a certain condition," that is to say, when "*to be more specific, the contemplation of death is the sole motive and cause of the transfer.*" Tested by this rule, not only were the instructions of the trial judge to the jury erroneous, but the plaintiff was entitled to a directed verdict, for, upon the undisputed evidence, the contemplation of death was not the sole motive and cause of the transfer.

The further implication of the opinion of the Appellate Court (Trans. 241) is that the expression "in contemplation of death" was confined to conveyances *causa mortis* until the decision *In re Dee's Estate* (148 N. Y. S. 423; 210 N. Y. 625) in 1913 and 1914. But reference to that very case (148 N. Y. S. 424) shows that it was "fairly established" before those decisions were rendered, that the like doctrine was applicable to conveyances *inter vivos*, if the facts justified such application. See also *In re Palmer's Estate*, 102 N. Y. S. 236.

The New York cases above cited, therefore, do not disclose that conflict of reason or authority suggested in the opinion of the Circuit Court of Appeals. On the contrary, various decisions to which we have alluded, rendered subsequent to *In re Dee's Estate*, cited by the Court of Appeals (Trans. 241) make clear that the definition given by the Appellate Court in the case *In re Baker's Estate* (82 N. Y. S. 390; 178 N. Y. 578) correctly expressed the rule of law in that State when that phrase was adopted by the Congress of the United States in 1916, and that that rule of law remains unaltered.

(c) *The Illinois Cases.* It is next said (Trans. 241) that the Illinois decisions fall short of supporting plaintiff's definition. The Circuit Court of Appeals quotes the definition in *Rosenthal vs. People*, 211 Ill. 306, 309:

"A gift is made in contemplation of an event when it is made in expectation of that event and having it in view, and a gift made when the donor is *looking forward to his death as impending*, and in view of that event, is within the language of the statute."

We are unable to perceive any material distinction between this definition and that given in the New York cases above cited. Tested by it, Mrs. Dickel's conveyance to the Detroit Trust Company was not made "in contemplation of death." Mrs. Dickel did not make a gift in expectation of death (unless it be "that general expectation of death which every mortal entertains," which concededly is not within the legislative intent), nor did she look forward to her death as impending. To "impend" is to "hang or be suspended over; to threaten from near at hand; to menace; to be imminent." (Webst. Int. Dict.)

It is said (Trans. 242) that no definition of the term was given in *People vs. Kelly*, 218 Ill. 509, 515. But the attending physician there testified (p. 514) that Mr. Kelly "was not in immediate danger of death at the time the trust deed was executed and delivered," and there was further testimony that the conveyance was made as a provision for the grantor's two sons. Because of this testimony the court distinguished the case from the *Rosenthal* case (211 Ill. 306) and the *Merrifield* case (212 Ill. 400), saying that

"the evidence showed clearly that both *Rosenthal* and *Merrifield* were *about to die* at the time they made the transfers there considered, and that the transfers of the bulk of their estates were made to their immediate descendants as a disposition of

their respective estates in contemplation of death which they each knew was almost immediately likely to follow, and which did follow the making of the transfers within a few days."

In the brief for plaintiff in the Circuit Court of Appeals we cited and relied on *People vs. Carpenter*, 264 Ill. 400, 408, where the court says:

"Of course, the words 'in contemplation of death' as used in these statutes do not mean that general expectation of all rational mortals that they will die some time, but it means an apprehension of death which arises from some existing infirmity or impending peril."

It is said by the Circuit Court of Appeals (Trans. 242) that the court in *People vs. Carpenter* cites the *Rosenthal* and *Benton* cases, and that those cases fall short of fully sustaining the definition thus given, and that the language last quoted "was purely obiter." We have already recited the definition given in the *Rosenthal* case, which was reaffirmed in the *Benton* case (234 Ill. 366, 370), and have shown that it is identical in substance with the definition subsequently given in the *Carpenter* case. Obviously the Illinois Court so understands. Nor do we think the Court of Appeals justified in brushing aside this definition as mere *obiter dictum*. The conveyances in question in the *Carpenter* suit were made in the years 1905 and 1909, and Mr. Carpenter died in 1911. The court stated that the transfers if liable at all, were taxable under the third clause of section I of the statute of 1909 which taxed transfers made in contemplation of death of the grantor or intended to take effect in possession or enjoyment after such death (264 Ill. 404). The ruling was that the transfers were not taxable under this clause, save that

the transfer of a life estate was held taxable because taking effect at the death of the grantor. Two of the Justices dissented, saying (264 Ill. 411-412):

"The majority opinion holds that . . . the words 'in contemplation of death' do not refer to a general expectation of death, but an apprehension of death from some existing infirmity or impending peril. We agree with this construction, and under it none of the remainders limited in the trust agreements in this case are subject to tax under the act of 1909."

It will be preceived that the definition of the phrase "in contemplation of death" thus given by the Illinois court is taken from the New York decisions on which we rely and in the very language presented by us to the trial judge in our requests to charge. This in itself makes it obvious that the suggestion of the Circuit Court of Appeals (Trans. 241-242), that there is a conflict between the New York and Illinois decisions, is unfounded. But to set this point definitely at rest, we quote the words of this decision of the Illinois Supreme Court (264 Ill. 404-405):

"The transfers in the case at bar, if liable at all, are taxable under the third clause of section 1 of the statute of 1909. This clause of the statute is taken from the transfer tax statute of New York of 1892. There is nothing in the context of our statute that indicates that our legislature, in adopting the language of clause 3 above set out from the New York statute, intended that the adopted statute should have any different construction from that placed upon the same language by the Court of Appeals of New York prior to the enactment of the statute in this State. When a statute is adopted from another State or country and such statute has been previously construed by the courts of the State or country from which it is taken, the statute is deemed, as a general rule, to have been adopted to-

gether with the construction so given to it. * * *
This rule has been applied by this court to inheritance tax cases."

That the decisions of the Illinois court precisely uphold our contention in the suit at bar will be seen upon reference to the later case, *People vs. Danks*, 289 Ill. 542, 547-548, where it is said:

"The purpose of the provisions imposing a tax upon gifts and transfers intended to take effect in possession or enjoyment after the death of the donor, or made in contemplation of his death, was to prevent an evasion of such laws by a distribution of property just before or in anticipation of the owner's death. Its manifested purpose was to include all gifts or transfers made prior to the donor's death which were similar in their nature and effect to a testamentary disposition of property or accomplished the same object under circumstances which imparted to it the characteristics of a devolution of property made in anticipation of the donor's death. *Rosenthal vs. People*, 211 Ill. 306, * * * A gift is made 'in contemplation of death' when it is made in expectation of that event, or with that event in view. *Rosenthal vs. People*, *supra*. The term does not mean that general expectation which all rational persons have that they must die some time, but refers more particularly to *that apprehension of death which arises from some existing infirmity of such a character as would prompt an ordinarily prudent person to make a disposition of his property* and bestow it upon those whom he regarded as most entitled to be the recipients of his bounty. *People vs. Carpenter*, 264 Ill. 400, * * *. What prompts the making of such a conveyance rests upon the facts and circumstances surrounding each particular case. No general rule can be formulated which will fit all cases, but each case must be examined and determined on its own facts and circumstances, in the light of the experience which the courts have gained in dealing with such matters. For this purpose, the donor's age, *physical condition*, and any action contemplated to be taken by him with respect to his health, as well as the length

of time he survives the making of the transfers, are all proper matters to be considered in determining whether or not the act was done in contemplation of death. If, upon a consideration of all the surrounding facts and circumstances, it is apparent the donor's condition was such that he might reasonably have expected death at any time, and the disposition made of his property is such as he had contemplated making in that event, or such as he might reasonably be supposed to have desired to be made at his death, and no other moving cause is apparent for making the transfer at the time it was made, the gift will be deemed to have been made in contemplation of death, even though the transfer is absolute in form and such as would invest the donee with the absolute right to the property during the lifetime of the donor."

(f) *The Wisconsin cases.*

In Wisconsin also the New York statute has been adopted and the construction there placed upon the expression "in contemplation of death" has been reaffirmed by the Wisconsin courts. This appears upon reference to the case, *State vs. Thompson*, 154 Wis. 320, 46 L. R. A. (N. S.) 790. Mr. Dessert died in December, 1910, aged ninety-two. By his will, made in 1891, he gave his estate which was appraised at \$207,000.00, to his only daughter and child. Between July 6, 1903, and November 27, 1909, he made various gifts to his daughter aggregating \$476,000.00. Until December, 1910, he was in good health and his faculties were unimpaired. His physical and mental condition during that period were unusual for a man of his age. There was nothing (except it be age) to suggest that death might be impending prior to a few days before his death.

And in that same case the Supreme Court of Wisconsin disposed of the "aged person" argument in the following language:

"It is apparent, therefore, that it would be illogical to hold that proof that a person was aged when he made a gift conclusively establishes that it was made in contemplation of death. This could not be true if the donor might be actuated by any other motive. Common knowledge and experience teach us that aged people frequently give property to their children because of their desire to help them, and without any thought in reference to their own deaths. Mr. Carnegie is an old man in years. He has given away what would make several princely fortunes. It could not be fairly said that the feeling that he must soon die was the cause that actuated him to give. Instead it was the pleasure of bestowing a part of his fortune where he conceived it would accomplish much for the uplift and betterment of mankind by furnishing useful and healthful reading matter free of charge."

"This brings us to the last question in the case, and that is whether the age of Mr. Dessert was so great when the gifts in question were made as to establish the fact that they were made in contemplation of death. If there is room for conflicting inferences, the decision of the Circuit Court must stand. The deceased was eighty-six years old when he made the first of the large gifts, and a year and a half older when the second was made. He died at the age of ninety-two, being sound and active in mind and body until three months before his death. The evidence all tended to show that his physical and mental faculties remained unimpaired until his last illness, except that he was somewhat deaf.

"We do not think the court can fix any particular age limit, and say that after it is reached, a party can give his property away only in contemplation of death. In a sense, 'old age' is a relative term. Some men are old at sixty, although they may have no organic disease. Others are vigorous in mind and body at seventy, and still others long after they have passed their eightieth milestone. • • • It is an erroneous concept to conclude that aged persons dispose of their property because they think that death is staring them in the face. The hypochondriac or the pessimist might entertain such an idea, but such a one rarely

attains old age. On the contrary, we think it is true that persons who have lived long and who are free from disease generally entertain the feeling that they have a few years longer to live, no matter how old they are, and that they do not regard death as imminent. • • •

"A transfer, valid as a gift, *inter vivos*, if made under circumstances which impress it with the distinguishing characteristics of being prompted by an apprehension of impending death, occasioned by a bodily or mental state which has a basis for the apprehension that death is imminent, would be a transfer made in contemplation of death within the meaning of the law.

"It is only gifts made in contemplation of death that are taxable. A parent has the right to give his property to any proper subject of his bounty, freed from any transfer tax, provided the contemplation of death is not the cause which impells the making of the donation."

It is said in the opinion of the Court of Appeals, however (Trans. 242), that the Wisconsin cases do not support our contention. The court cites *State vs. Pabst*, 139 Wis. 561, 590, and *State vs. Thompson*, *supra*, to uphold this contention. In *State vs. Pabst* it is said (139 Wis. 590), of the words "in contemplation of death," that it is obvious

"that they are not used as referring to that expectation of death generally entertained by every person. The words are evidently intended to refer to an expectation of death which arises from such a bodily or mental condition as prompts persons to dispose of their property and bestow it on those whom they regard as entitled to their bounty. • • •

A transfer valid as a gift *inter vivos*, if made under circumstances which impress it with the distinguishing characteristics of being prompted by an apprehension of impending death, occasioned by a bodily or mental state which has a basis for the apprehension that death is imminent, would be a transfer made in contemplation of death within the meaning of the law."

In this there is surely nothing inconsistent with the position of plaintiff in this court or in the courts below. The language used is a mere paraphrase of the language of the New York court in the case *In re Baker's Estate* embodied in our request No. IV to the court to charge the jury (Trans. 157).

The Circuit Court of Appeals seemed to be of the opinion that the decisions of the Wisconsin court in the Pabst and Thompson cases are inconsistent with each other and with the decisions of the courts of New York and Illinois (Trans. 243). We are unable to perceive any such inconsistency. Neither did the Supreme Court of Wisconsin perceive it, for in the Thompson case it quoted with approval (154 Wis. 328-329) the language of the court in the Pabst Case, and said:

“The definition of the words ‘in contemplation of death’ given in the Pabst Case does not differ from that announced by the New York court in *Matter of Baker*, 83 App. Div. 530, 82 N. Y. Supp. 390 (affirmed 178 N. Y. 575):”

and it then repeats the definition given in that case and embodied in plaintiff's request No. IV to charge the jury in the instant cause.

In the Thompson Case (154 Wis. 329) the Court also alluded to the doctrine of the Illinois courts which, it declared, did not differ from the rule adopted in Wisconsin. Confirmation of this will be found in the decisions in Illinois cited in subdivision (e) *supra*.

In 1913, after the decision in the Thompson case, the Legislature of Wisconsin enacted a law which taxed absolutely all gifts made within six years of death. This statute is referred to in the Estate of Ebeling, 169 Wis. 432, and is as follows:

“Every transfer by deed, grant, bargain, sale or gift, made within six years prior to the death of the grantor, vendor or donor, of a material part of his

estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable consideration, shall be construed to have been made in contemplation of death, within the meaning of this section."

Had the Federal Estate Tax Law of September 8, 1916, been in words similar to this 1913 law of Wisconsin, the argument made by counsel and approved by the court below would have had considerable force. The Congress did not choose, however, to adopt the 1913 Wisconsin statute, but preferred, in lieu thereof, to adopt a statute in practically the precise words of the earlier Wisconsin Act, construed in *State vs. Thompson*, 154 Wis. 320, which precisely upholds the construction for which we contend.

(g) *The California Cases.*

Spreckles vs. State of California, 30 Cal. App. 363, is in point. Mrs. Spreckels, the widow of Claus Spreckels, organized a corporation, to which she transferred a large amount of property, real and personal. Stock was issued to her in consideration thereof, and she gave this stock to three of her children, when at the age of seventy-nine, and suffering from a dangerous heart disease. She died within a month after the gifts. It was held that the transfer was not taxable because made in contemplation of death. Reviewing the testimony, the court said (p. 377):

"In support of this (the State's) position, it is pointed out that Mrs. Spreckels, at the time of the execution of the transfer, was a woman of venerable years, at best not far removed from the natural end of her life; that, for many years prior to and up to the time of the transfer, she had been a chronic sufferer from a serious and dangerous heart affliction, which was of a nature that from it her death might suddenly occur at any moment, a condition of which

undoubtedly she possessed a keen realization; that, as a matter of fact, her death occurred within a few weeks after she made the transfer."

But the court thus recapitulated the testimony in support of the holding that the transfers were not subject to taxation (p. 378):

"Shortly after her husband's death, in 1908, Mrs. Spreckels expressed her intention of forming a corporation for the avowed object of transferring her property thereto. She had often declared her intention of giving her property to the plaintiffs, and to Mr. Rudolph Spreckels stated that her desire was that her children, the plaintiffs, should own and enjoy the property *in her lifetime*. These ideas seemed, at all times and long prior to the date of the transfers, to have constituted the central thoughts of her mind until their crystallization by the organization of the investment company, the immediate transfer of the greater part of her estate thereto and thereupon the transfer of the stock thereof to the plaintiffs. Under the circumstances, it was, without any thought of her own death, or without any view to preparation therefor, a most natural thing for her to do. At her then advanced age, having other means far more than necessary for her own maintenance for the remainder of her life she doubtless conceived that she would, in her declining days, be the happier if relieved of the heavy burden and serious responsibilities which necessarily go with the control and management of vast and varied property interests, such as she was the owner and possessor of, and that, in obtaining release from these burdens, her happiness would be the more certainly assured by transferring her property to her children so that they might own and enjoy it in her own lifetime. While she was afflicted with a serious heart affection, and suffered intermittent spells of illness which temporarily confined her to her bed, it is evident that she did not, at any time prior to the date of the transfers, harbor the thought that her life was *in immediate peril from her malady*, or that she would not live for many years to come."

In support of this assertion, the court refers to the fact that about the time of the transfer Mrs. Spreckels was having her mansion at San Francisco repaired preparatory to her own reoccupancy of it, and to the further fact that she was contemplating a trip to Europe to visit her daughter and purchase appropriate furnishings for her residence.

The case of *McDougald vs. Wulzen*, 34 Cal. App. 21, is also a valuable case in support of the contention that the transfer in the suit at bar was not made in contemplation of death.

See also *Kelly vs. Woolsey*, 177 Cal. 325.

In the opinion of the Circuit Court of Appeals it is said (Trans. 243) that the California decisions are not specially pertinent, for the reason that the California statute contains a definition of the term "in contemplation of death;" that these decisions are not authority for the definition contended for by plaintiff; that they specifically reject the New York definition, based upon the confusion between gifts *causa mortis* and conveyances *inter vivos*.

The California statute was amended in 1911 and it appears in *Estate of Reynolds*, 169 Cal. 600, cited in the opinion of the court below (Trans. 243), that the amended law, which governed the transfer there in question, expressly defined the term to include "that expectancy of death which actuates the mind of a person on the execution of his will," and not to be limited to "that expectancy of death which actuates the mind of a person in making a gift *causa mortis*." The Congress, in enacting the law of September 8, 1916, appropriated the language of State statutes. It chose, however, to adopt, not this California statute as amended in 1911, but the statute then existing in New York and other States and which had existed in California prior to 1911.

In the court below attention was called to *Abstract and Title Guaranty Co. vs. State* 173 Cal. 691, decided in November, 1916, after Congress passed its law, and which decision Congress, therefore, did not have in view. That case concerned a transfer made prior to the 1911 amendment, and the California Court nevertheless, having that amendment in view, stated the same definition to be applicable as that contained in the amendment. However, the facts as to the condition of the decedent when making the transfer were such as to indicate clearly a gift in contemplation of death under any definition.

The California law is made clearer, however, by the more recent case of *In re Minor's Estate*, 180 Cal. 291, decided after the decision of the instant cause in the District Court and to which that court, therefore, did not have reference. The California Supreme Court there recognized that the California rule under the statute as amended differed from the rule in absence of such amendment, stating (p. 294):

"This is so whether the statute be considered and construed separately and solely in the light of its own language or with the aid of the amendment thereto. * * * That is to say, that, when measured *either by the commonly accepted or by the statutory definition of the phrase*, the transfer here involved cannot upon the undisputed facts of the case be fairly brought within and subject to the provisions of the inheritance tax act * * *."

It, therefore, appears that in so far as the California rule now differs from that in other States, it is because of express amendment to the statute recognized by the court to differ from "the commonly accepted rule."

The Circuit Court of Appeals erred in stating (Trans. 243) that the California decisions are not authority for the definition for which we contend, and that they "spe-

cifically reject the New York definition." This is shown by the Spreckels Case (30 Cal. App. 369) decided in 1916, already cited: for the court there quotes approvingly the definition of the words "in contemplation of death" thus:

"The words do not refer to that general expectation commonly entertained by all persons, but rather to that apprehension which arises from some existing condition of body or some impending peril."

While the reference made by the California Court for this definition is to Ross on Inheritance Taxation, section 117, it will be perceived that Mr. Ross takes the definition from the decision of the New York court to which we have already alluded. (In re Baker's Estate, 82 N. Y. S. 390; 178 N. Y. 575). And it is this identical definition to which the Supreme Court of California, in its most recent decision upon this subject (Estate of Minor, 180 Cal. 294), referred as "commonly accepted" definition of the phrase "in contemplation of death."

Furthermore, in the Spreckels Case, after defining the phrase "in contemplation of death" (in a case arising upon a transfer made before the amendment of the statute), in the very language of the New York courts, the California court cites the Illinois and Wisconsin cases, saying (30 Cal. App. 370) that the views thus expressed by it "upon the meaning of the words referred to are in harmony with those to be found in all the cases." This shows that the California court is wholly unconscious that it has "specifically rejected the New York definition," and believes, on the contrary, that it has "specifically adopted the same as controlling in all cases not dependent upon the amended statute of 1911.

Counsel in the Court below also cited *Conways Estate vs. State*, 120 N. E. 717, (Ind. App). This case was de-

ecided in November, 1918, *after* the passage of the Act of September 8, 1916, and, therefore, its definition of "in contemplation of death" was not before Congress when it adopted that term from State statutes. Furthermore, the case is merely one decided in a lower Indiana court. The definition of the term "in contemplation of death" was, by the court, based on the cases from other States, but somewhat loosely stated. Moreover, the court (p. 720) made it clear that the statute did not "refer to that general expectation of death entertained by all persons," but did refer to that which arises from "bodily or mental conditions," and that it was not the intent to affect "the right of the owner to make an absolute gift." Therefore, the case, even if it could be said to be out of line with decisions of the highest courts of other States, affords no foundation for the novel definition of the District Judge in the instant cause.

(h) *The District Judge declined to follow the Rule of the State Courts and that declination was upheld in the Appellate Court.*

The views of the trial court upon the interpretation of the phrase "in contemplation of death" will be found in his opinion refusing to direct a verdict for plaintiff (Trans. 160-165), in the denial of plaintiff's requests to charge numbered 4, 5, 6, 7, 8, 9, 10 (Trans. 157-159), and in his charge to the jury (Trans. 165-170).

In the opinion denying the motion for directed verdict, the District Judge said that the authorities are not in harmony with reference to the meaning of this phrase; that all are agreed that the term does not mean the general expectancy of death entertained by all human beings; that at the present day all are also agreed that gifts made "in contemplation of death" are not necessarily limited to gifts *causa mortis* or *in extremis* (Trans. 164).

We have not been able to perceive that essential want of harmony which the District Judge professes to find, in the decisions of the courts on this subject. Some of the earlier New York cases may be supposed to declare that the expression "in contemplation of death" refers to gifts *causa mortis*, and later decisions in that State, as well as decisions in other States, do not limit the meaning of the term to gifts which are strictly *causa mortis* within the technical definition of that term. Aside from this one particular, we believe the current of authority to be substantially uniform. In this division of our brief we have collected the decisions of the various States where this question has arisen. Upon referring to those decisions it will be seen that the New York courts (In re Baker's Estate, 82 N. Y. S. 390; affirmed on opinion below, 178 N. Y. 575) declare that the words "in contemplation of death"

"do not refer to that general expectation which every mortal entertains, but rather the apprehension which arises from some *existing* condition of body or some *impending* peril."

In substance, and, indeed, as we have already shown, in this division IV., in precise phraseology, this accepted definition of the New York courts meets the approval of the courts of Illinois, Wisconsin and California (except as modified in California by later statute), which are the three other States where the question here involved has arisen.

In his charge to the jury, the District Judge, in elucidation of the meaning of the words "in contemplation of death," spoke of gifts *causa mortis*, defined them as gifts made because the person is in death or dying, and declared that that condition was not what was meant (Trans. 167). It will be noted that the court, in defin-

ing this term, omitted an essential element of a gift *causa mortis*, viz.: that it is to be kept by the donee as his own *in case of the donor's decease*.

2 Black. Com. 514.

1 Bouvier's Law Dict., p. 924 (Rawle's 3rd Rev.).

We apprehend that it is the existence of this element, thus overlooked by the trial judge, which has induced some of the courts to decline to limit the meaning of the term "in contemplation of death" to gifts which are strictly *causa mortis*.

(i) *The District Judge refused requests to charge based on the above authorities, and the Court of Appeals upheld him in so doing.*

Having thus declined in his opinion upon the law of the case to follow the accepted definition of the words "in contemplation of death" as given in the State courts, and this despite the fact that Congress adopted the State statutes containing these words after they had been so interpreted, the District Judge was consistent in refusing to give various requests to charge preferred by the plaintiff in the very language of the decisions of the State Courts to which we have adverted. The requests to charge to which we now refer are numbered 4, 5, 6, 7 (Trans. 157-158). Exception was taken to refusal to give the same (Trans. 170); and assignments of error 44, 45, 46 and 47 are based thereon (Trans. 220-221).

Thus the District Judge declined to grant plaintiff's fourth request wherein he was asked to charge the jury that (Trans. 157):

"the words 'in contemplation of death' do not refer to that general expectation of death which every mortal entertains, but rather the apprehension which arises from some existing condition of body or some impending peril."

This instruction so refused by the court is taken from *In re Baker's Estate*, and is the accepted definition as approved by the New York courts (See subdivision (d) *supra*).

The court also declined to give plaintiff's fifth request to charge, which was as follows (Trans. 157):

"If you find that when Mrs. Dickel made the deed of trust in question, she was an old woman, somewhat enfeebled as the result of old age, and that she must have known that she could not live many years longer, yet if you further find that she was then under no apprehension of death arising from some existing condition of body or some impending peril, I charge you that the deed of trust was not made by her 'in contemplation of death,' within the meaning of that phrase, as used in the Act of Congress."

This request so refused is based on the authorities cited in subdivisions (d), (e), (f) and (g) above, and it is clear that a request much stronger in plaintiff's favor would have been justified under *In re Spaulding's Estate*, 63 N. Y. S. 694, and other cases to which we have referred.

The trial judge declined to charge that there is no proof in this case tending to show that the transfer made by Mrs. Dickel to the Detroit Trust Company was made for the purpose of defrauding or evading the Federal Revenue Law (Request number 6, Trans. 157-158). He declined also to grant plaintiff's request number 7 (Trans. 158), in which he was asked to instruct the jury that, in determining whether the transfer was made "in contemplation of death," it was proper to consider whether there was or was not an intent on the part of Mrs. Dickel to escape or avoid payment of the Estate Tax; and in which he was further asked to instruct the jury that they were entitled to consider the circumstance that the Estate

Tax Law was passed some sixteen months after the transfer as bearing on the question whether the transfer was or was not made "in contemplation of death."

We have already seen (subdivision (c) *supra*) that this provision relative to transfers "in contemplation of death" was inserted in the Act for the express purpose of preventing frauds upon the Estate Tax Law, and surely, if such was the intent of Congress in enacting the law, the fact that no such fraud was intended in the instant cause was a circumstance not improper to be considered by the jury. In the case *In Matter of Bullard*, 78 N. Y. S. 491, cited in subdivision (d) above, the circumstance that there was no evidence of intent to defraud the State of the inheritance tax was deemed important to be considered as bearing upon the question whether the transfer was made "in contemplation of death."

(j) *The District Judge coined a new definition and the Appellate Court approved the same.*

Having thus discarded as guides all previous judicial decisions, and concluded to submit the cause to the jury, the trial judge found it necessary himself to define to the jurors what the Congress meant by the phrase "in contemplation of death." The charge to the jury upon this point is found on pages 167-168 of the Transcript, exceptions were duly taken (Trans. 171-172) and assignments of error numbered 55, 56, 57, 58, 59 are based thereon (Trans. 224-225).

The trial judge first told the jury that the sole question for their determination was whether Mrs. Dickel, in April, 1915, transferred to the Detroit Trust Company the trust property in contemplation of death, and he added (Trans. 167; assignment or error 55; Trans. 224):

"that is to say, did she have in contemplation her own death, and was that the reason for making the transfer to the Detroit Trust Company."

He then gave the jury two instructions, negative in character, as to what is not meant by the phrase "in contemplation of death." In the first of these negative instructions he stated (Trans. 167; assignment 56; Trans. 224) that

"the meaning of the term is not necessarily limited to an expectancy of immediate death or a dying condition;"

that it did not refer to gifts *causa mortis*; and he defined to the jury gifts *causa mortis* in manner as we have already recited in the preceding subdivision (h), leaving out the vital element of such gift, that it is to be kept by the donee as his only in case of the donor's decease.

In the second of these negative instructions the District Judge repudiated, in emphatic language, the interpretation of the phrase "in contemplation of death" adopted by the various State courts (Trans. 167-168; assignment 57; Trans. 224). This he did in the following words:

"Nor is it necessary, in order to constitute a transfer in contemplation of death, that the conveyance or transfer be made while death is imminent; while it is immediately pending by reason of bodily condition, ill health, disease or injury or something of that kind."

Immediately following these directions to the jury, negative in character, the District Judge gave two affirmative instructions, most positive in character, and which in effect were equivalent to directing a verdict for defendant. In the first of these (Trans. 168; assignment 58; Trans. 224) he charged:

"But a transfer may be said to be made in contemplation of death if the expectation or anticipation of death *in either the immediate or reasonably distant future* is the moving cause of the transfer" (The italics are ours).

And then, as if by way of emphasizing this newly coined definition, he reiterated the instruction in these words (Trans. 168; assignment 59; Trans. 225) :

“And in this case if you find that Mrs. Dickel, in April, 1915, was moved to create a trust and to make the transfer to the Detroit Trust Company by her expectation or anticipation of death *in either the immediate or the reasonably distant future*, then you will be warranted in finding that this transfer was made in contemplation of death.” (Again the italics are ours).

The disastrous effect on plaintiff's case of the unfortunate language above italicized will be seen on turning to the transcript. In the opinion upon the law of the case, denying the motion for directed verdict, the District Judge announced his dissatisfaction with the definition given in the books of the term “in contemplation of death” and said that he had evolved one from his own mind, and that it was this (Trans. 165) :

“A transfer or gift of property without consideration is made in contemplation of death when the moving cause of such transfer is the expectation or anticipation of death either immediately or *in the reasonably close future.*”

We respectfully submit that this definition departs widely from the rule laid down by the adjudged cases, and adopted by the Congress when it appropriated the State statutes so interpreted, and hence was highly prejudicial to plaintiff. But when the District Judge, in his charge to the jury, substituted the word “*distant*” for the word “*close*,” we urge that the rule so declared from the bench became elastic, uncertain, confusing, and afforded to the jurors no safe guide.

Furthermore, it will be noted in what unfortunate plight counsel for plaintiff were placed by this sudden change of front on the part of the trial judge. At the

close of the legal argument and immediately before the arguments to the jury were begun, counsel were informed by the judge that he would charge that, in order to bring the transfer within the condemnation of the Act of Congress, it must be made in "the expectation or anticipation of death either immediately or in the reasonably close future" (Trans. 165). This charge, however widely it departed from the adjudged cases, afforded at the least the opportunity of arguing to the jury that Mrs. Dickel, when she made the transfer, did not expect or anticipate death in the reasonably *close* future. Plaintiff's counsel did so argue. They informed the jury what the court would charge in this regard and urged that, under the rule so to be declared, the transfer was subject to no tax. When the District Judge, immediately upon the conclusion of the argument, charged that the transfer was taxable if Mrs. Dickel anticipated death "in the reasonably *distant* future," not only did the arguments of plaintiff's counsel fall flat, but, without fault on their part—and, of course, without intent on the part of the trial judge—they were put in the light of having attempted to deceive the jury.

But what were the jurors to understand by the phrase "expectation or anticipation of death in the *reasonably distant future?*" We can only regard these italicized words as ill-chosen and anomalous. It appears from the opinion of the trial judge himself that they wholly lack the support of judicial precedent, and that he has treated the case as one of first impression (Trans. 165). But if the District Judge were justified in disregarding the adjudication of courts of high repute and in coining a definition of his own, it would seem that the definition actually chosen was admirably calculated to confuse the issue. Do the words "*reasonably distant*

future" signify a period more or less remote than that at which death might be expected to occur in the normal course of events? Mrs. Dickel was born in 1838 (Trans. 77), and hence was seventy-six or seventy-seven years of age when the transfer to the Detroit Trust Company was made. Her expectancy of life, as shown by the tables, was approximately five and three-fourths years. "The reasonably distant future" might well be understood by the jury to extend to a period much beyond this normal expectancy of life, or at least to be fully equal thereto. If so, upon all the authorities, as well as upon the reason of the rule, the instruction was plainly misleading.

If one makes a transfer of property to members of his family because of an apprehension of death arising from some *existing* condition of body or some *impending* peril, he may well be said to make it "in contemplation of death," for the result, if not the purpose, is to defraud the revenue laws. But if he makes a transfer of property to members of his family because of the anticipation or expectation of death "in the *reasonably distant future*," it in no wise differs from family settlements which are commonly made by prudent men of affairs, with no thought of evading the revenue laws.

All experience, all knowledge leads to the inevitable conclusion that all must die some time. He who clings to life most tenaciously can only hope that his death will be deferred to "*the reasonably distant future*." It is obvious that, if one makes a transfer because influenced or moved by expectation or anticipation of death "*in the reasonably distant future*," it is only that *general* expectation of death which every mortal entertains and which, under all the decisions, does not suffice to bring the case within the Estate Tax Law. In his opinion denying a directed verdict the District Judge told counsel in the case that all are agreed that the term "in con-

temptation of death" does not mean the general expectancy of death entertained by all human beings (Trans. 164). This legal principle, upheld by all the adjudged cases and firmly embedded in our jurisprudence, was repudiated when, a few moments later, the jurors were called back to the court-room and instructed that this phrase meant "expectation or anticipation of death in the . . . reasonably distant future."

In the opinion of the Circuit Court of Appeals all the considerations to which we have just alluded were disregarded. To sustain the decision of the District Court it was found necessary to hold that the definition given by the trial judge at the conclusion of the legal argument and that given by him in the charge to the jury are identical in effect. Let us use the words of the opinion. It is said (Trans. 244):

"While 'close' and 'distant' are frequently directly opposed to each other, yet when used as here they are not necessarily opposed. *A time which is only reasonably distant is reasonably close.*" (Italics are ours.)

As to this we remark, first, that it is error to speak of these two words as used "*here*", that is to say, before the jury. They were not so used. It was only in the presence of counsel that the District Judge made use of the words "*reasonably close future*" when he informed counsel what his charge would be (Trans. 165). After they had made arguments to the jury in reliance that he would so charge, he used in the presence of the jury only the expression "*reasonably distant future*", and, as if to accentuate it, used it twice (Trans. 168).

But we are unable to comprehend the reasoning which persuaded the learned Court of Appeals that "*distant*" means "*close*" and "*close*" means "*distant*". The men in the jury-box were plain men, not dialecticians or

schoolmen. It is to be presumed that they understood words in their ordinary signification, and, in the meaning ordinarily attributed to them, these two words are not synonyms, but are direct opposites one to another. As well may it be said that that which is reasonably hot is reasonably cold, or that that which is reasonably sweet is reasonably bitter, or that that which is reasonably certain to occur is reasonably uncertain to occur. Thus interpreted, our language is robbed of meaning. When these jurors were told, in substance, that, if Mrs. Dickel, at the time of making the transfer, anticipated death in the reasonably distant future, plaintiff could not recover, they could not and did not understand therefrom that the question was whether, because of some existing condition of body or some impending peril, she then believed herself about to die. Consequently they were misled by the definition which the District Judge coined in the hurry and heat of the trial, instead of following the adjudged cases to which his attention was called.

It is said by the Circuit Court of Appeals (Trans. 244) that there was nothing in the exception to the definition as made which would call the trial court's attention to a proposition that the word "close" should have been used instead of "distant", especially since there had been also an exception given to the court's announced intention to charge a "reasonably close" future; that, had the court's attention been called to the use of the word "distant" instead of "close", doubtless any question of difference between the two would readily have been obviated. We are surprised at this suggestion, for there was no misleading of the trial judge, nor any inadvertence in the use by him of the word "distant", nor has the trial judge or counsel for the Government at any time so claimed.

The exceptions were taken by plaintiff's counsel immediately upon the conclusion of the charge and in the

presence of the jury (Trans. 170). Two exceptions upon this point were taken in the very language of the charge, whereby the attention of the District Judge was twice distinctly challenged to the point that he had used the expression "reasonably distant future" in his directions to the jury (Trans. 172). After verdict and judgment a motion for new trial was made, the ninth ground of which set out that the District Judge had thus twice used in his direction to the jury the expression "reasonably distant future" (Trans. 174-175). This motion was argued before the District Judge and denied by him on the merits (Trans. 176), and bill of exceptions was thereafter settled saving the point in two exceptions assigned upon the charge. All this was without suggestion from the District Judge of any inadvertence in the use by him of such expression and without an intimation to like effect from either of the two counsel for the Government present at the trial. The suggestion in the opinion of the Appellate Court that unintentionally one word may have been used by the trial judge in lieu of another is without any foundation.

Furthermore, we are at loss to understand how the plaintiff could except to a charge more definitely or exactly than by calling attention of the trial judge to the precise words used by him and which are claimed to be erroneous.

(k) *The District Judge erred in charging the jury that they were entitled to consider the statutory presumption as evidence, and the Court of Appeals approved his action.*

The charge to the jury upon this point is found on pages 168-169 of the record, the exceptions on pages 172-173, and assignments of error numbered 60 and 62 are based thereon (Trans. 225, 269, 270).

In that portion of his charge embraced in assignment of error numbered 60 (Trans. 225, 269), the trial judge referred to that clause of Section 202 of the Act of Congress which reads:

“Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by a decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death, within the meaning of this title.”

The trial judge first charged that by that statute Congress created a rule of evidence merely. Thus far we do not question the correctness of the instruction. Nor do we question the further instruction that, under this statute, the burden would be on plaintiff to establish, by a fair preponderance of evidence, that the transfer was not made by Mrs. Dickel in contemplation of death, if the Act of Congress could be construed as retrospective and as controlling transfers fully vested prior to the passage of the Act. These last mentioned questions are argued in preceding divisions of this brief.

But the District Judge did not abide by the rule which he himself laid down (Trans. 168) that by this statute Congress created a rule of evidence merely. In his opinion denying plaintiff's motion for directed verdict, he referred to plaintiff's claim that a transfer is not made in contemplation of death unless through disease, injury, peril or other cause, death is apparently imminent, and said that the presumption created by the statute seemed to negative the claim of plaintiff (Trans. 165). For this reason the trial judge declined to follow the decision of the State courts defining the term “in contemplation of death,” (Trans. 165). It seems clear, therefore, that the District Judge would have followed the decisions of the

State courts defining the phrase in question, except for the presumption created by statute in the case of transfers made within two years prior to death.

The effect of the statute, in a case to which it applies, is to cast upon the plaintiff the burden of proving that the transfer was not made "in contemplation of death," in the event that it appears that the same was made within two years prior to death. But the fact that the burden of proof is shifted to the tax-payer does not alter the approved definition of the term "in contemplation of death," nor abolish the rule that the apprehension of death must arise from some *existing* condition of body or some *impending* peril.

Exception was taken by plaintiff (Trans. 173) to that portion of the charge (Trans. 169) embraced in assignment of error numbered 62 (Trans. 225).

In this portion of the charge, the District Judge enjoined upon the jury to bear in mind the presumption which the statute raises and give it the consideration to which it is entitled, and then said (Trans. 169), "and it is to be considered by you *in connection with the other evidence in the case*," in determining "whether or not that transfer by Mrs. Dickel to the Detroit Trust Company at that time was made by her in contemplation of death."

Even if (1) the transfer is of a material part of decedent's property, and (2) is in the nature of a final disposition or distribution thereof, and (3) is made by decedent within two years, and (4) is without consideration, it is not declared by the Act to have been made "in contemplation of death." The Act merely declares that it shall be so deemed "*unless shown to the contrary*". But the jurors were instructed that this presumption, which continues for only two years at the most, might be considered by them as bearing on whether the transfer was

made by Mrs. Dickel "in contemplation of death" (Trans. 169), that is to say, as the court defined the term, whether she was moved to make the transfer in expectation or anticipation of death "*in the reasonably distant future*"—a period of time which, though incapable of being exactly fixed, would doubtless be understood by the jury to be of much greater length than the period of two years which constitutes the life of the presumption.

The charge, we submit, was, therefore, misleading, even if it were proper to submit to the jury this presumption to be considered in connection with the other evidence in the case. We contend, however, that it was improper to allow the jury to consider this presumption "*in connection with the other evidence in the case*" in arriving at their verdict.

Much evidence was adduced by plaintiff tending to show, and which, indeed, as we contend, conclusively established that the transfer was not made by Mrs. Dickel "in contemplation of death". This consisted in part of the testimony of Mr. Vertrees, Mr. Shwab, Mr. Spicer and others, as well as a mass of written evidence from which it appeared that the transfer to the Detroit Trust Company was made because of the favorable tax laws of Michigan. It also consisted in part of the testimony of the physicians and other witnesses, in substance to the effect that Mrs. Dickel had then no apprehension of death at a period of time earlier than the termination of her expectancy of life. Indeed, the undisputed proofs show that Mrs. Dickel believed her health to be better than normal and took pride therein. (See statement of facts, paragraphs 18-24.) As opposed to this, the trial court said to the jurors (Trans. 169) that they might take into consideration Mrs. Dickel's age and physical and mental condition, the character of the trust, the beneficiaries thereunder, and the wills executed somewhat later.

If the trial court was correct in the view that there was evidence in behalf of defendant which justified the submission of the issue to the jury, we urge that the issue should have been determined upon the *evidence* in the cause, and *not* because of a *presumption* raised to influence the verdict of the jury *in the absence of evidence*. This presumption, properly raised in the absence of evidence, did not *increase* for the jury the *weight* of the facts testified to by defendant's witnesses, when plaintiff had adduced evidence to the contrary; but the issue should have been decided upon the facts so established, uninfluenced by the *artificial presumption of law*, which the jury was directed to consider "in connection with the *other evidence* in the case."

Mr. Wigmore, in his work on Evidence, Vol. IV, sec. 2491, says:

"It must be kept in mind that the peculiar effect of a presumption 'of law' (that is, the real presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion *in the absence of evidence to the contrary* from the opponent. If the opponent does offer evidence to the contrary (sufficient to satisfy the judge's requirement of some evidence), the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule. * * * It is therefore a fallacy to attribute (as do some judges) an artificial probative force to a presumption, increasing for the jury the weight of the facts, even when the opponent has come forward with some evidence to the contrary."

This rule is upheld in many adjudged cases.

Woodward vs. Chicago, M. & St. P. Ry. Co. (C. C. A. 8), 145 Fed. 577, 580.

Lincoln vs. French, 105 U. S. 614, 617.

Fresh vs. Gilson, 16 Pet. 326, 330.

Toledo, St. L. & W. R. Co. vs. Howe (C. C. A. 6), 191 Fed. 776, 783.

Wabash R. Co. vs. DeTar (C. C. A. 8), 141 Fed. 932, 935, 939.

In *Woodward vs. Chicago, M. & St. P. Ry. Co.*, *supra*, there was under consideration the presumption created by the Minnesota statute, to the effect that if sparks were scattered by a locomotive, it should be *prima facie* evidence of negligence of the Railroad Company, or defect in the engine. The opinion was by Circuit Judge Sanborn, who said (145 Fed. 580):

“This presumption, however, is not a conclusion of law. It is nothing but an artificial, rebuttable presumption of fact whose sole office is to change the burden of proof. When that result has been attained, the presumption becomes *functus officio*. It may not be used after the evidence of the facts has been adduced to raise an issue for the jury which the evidence itself does not present. Hence, in the first instance, it is always a question of fact for the court at the close of the evidence whether or not the presumption of negligence arising from these statutes has been overcome by the evidence of the care exercised by the defendant. If the proper employees of the railway company have testified to the effect that there were no defects in the locomotive, or that reasonable care had been used to avoid them, and that the engine was operated with ordinary care and skill, and the evidence at the close of the trial is so conclusive that an opposite finding is not sustainable, *the statutory presumption has been overcome as a matter of law*, and it is the duty of the court to instruct the jury in a fire case from these states, as in other cases, to return a verdict for the railway company.”

In the opinion of this Court, in *Toledo, St. L. & W. R. Co. vs. Howe*, 191 Fed. 776, 783, it is said that

“When facts are wanting, presumptions are permitted to take their place. It is put this way by the Supreme Court:

'Presumptions are indulged in to supply the place of facts. They are never allowed against ascertained and established facts. When these appear presumptions disappear.' "

In *Wabash R. Co. vs. DeTar* (C. C. A. 8), 141 Fed. 932, the action was for negligence and involved the presumption of the exercise by the deceased of due care and caution. With reference to this presumption it is said (p. 935):

"As the presumption reflects only the ordinary or usual conduct of men, and is at utter variance with what they sometimes do, it is *not entitled to probative force or weight as affirmative or positive evidence*, but only to the force or effect of a rebuttable inference of fact which must necessarily yield to credible evidence of the actual occurrence."

And again, on p. 939, in the same opinion, it is said:

"In its charge to the jury, as before shown, the court, in addition to telling them that the burden of establishing contributory negligence on the part of the deceased was on the defendant and must be maintained by a fair preponderance of the evidence, *attributed to the presumption of the exercise of due care the probative force and weight of affirmative evidence, notwithstanding there was substantial evidence tending to explain the actual occurrence*, and also went to the extreme of indicating that the presumption was to be regarded as if it were testimony coming from the deceased. *This was error, and plainly tended to mislead the jury.*"

Even though a transfer is made under apprehension of death from some existing condition of body, or some impending peril, that apprehension may prove unfounded, and death may not occur in the immediate future, nor, perhaps, for many years. The purpose of the presumption created by the statute was to provide a rule that, *in the absence of evidence to the contrary*, the jury would be compelled to find that the transfer was made "in contem-

plation of death'' in all cases embraced within the Act in which death occurred within two years after the transfer. That was the *sole* purpose of the law, if reliance can be had upon the authorities above cited, and, there being evidence upon the point, the jurors were not entitled, in the suit at bar, to consider the statutory presumption in determining on which side the preponderance of proof lay.

The court, however, not merely directed the jurors to consider that presumption in weighing the evidence, but, what was much more harmful to plaintiff, saw in this presumption, designed merely to establish a rule respecting the burden of proof, sufficient reason for abandoning the definition of the term "in contemplation of death", deliberately adopted by the Congress from the decisions of the State Courts, and applying, in lieu thereof, a definition so uncertain in character that it could not possibly prove to be a safe guide to the jurors in their deliberations.

The Circuit Court of Appeals (Trans. 246) cites and relies on three decisions of this Court as establishing a doctrine contrary to that for which we contend. These cases are referred to and the points decided by this court set forth in the brief filed by our associates, Messrs. John J. and William O. Vertrees (pp. 89 et. seq.).

The point argued in this subdivision is an important one. If the transfer, though made prior to the enactment of the statute, could properly be presumed to have been made "in contemplation of death", the presumption could no longer be indulged when the depositions taken at Nashville were read and other proofs were adduced by plaintiff, from which it appeared that Mrs. Dickel was under no apprehension of death at the time, and that the transfer to the Detroit Trust Company was in pursuance of a plan to create a trust in a State whose tax-laws were

favorable. When this evidence was introduced, the burden of proof was sustained by him, and, in the absence of opposing evidence, plaintiff was entitled to a directed verdict. We contend that the defendant introduced no proofs upon this head which arose to the dignity of legal evidence. We insist in that behalf:

1—That, upon the undisputed facts, the jury should have been directed to find a verdict for plaintiff.

2—That the court erroneously left it to the jury to determine whether the deed of trust of date April 21, 1915, was made in contemplation of death, when there was no evidence in the case to support a verdict that the deed of trust was so made.

3—That if there were any evidence to go to the jury on which to base a verdict in favor of the defendant, it was a scintilla merely, and should have been disregarded, and a verdict in favor of plaintiff should have been directed.

The District Judge ruled however, that there was evidence to go to the jury on the question whether the transfer was made "in contemplation of death." (Trans. 167-169.) We respectfully insist that this ruling was erroneous and that this error would have been avoided had the accepted definition of this phrase been applied. Upon this point we urge:

(a) The court declared that the jury were warranted in finding that Mrs. Dickel made the transfer "in contemplation of death," if she was moved to make it by her expectation or anticipation of death in either the immediate or the *reasonably distant future*. But if regard be had to the definition generally, and, as we claim, properly accepted by the State Courts, that the term refers to the apprehension which arises from some *existing* condition of body or some *impending* peril, there would have been nothing to submit to the jury. Not only was there no

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evidence tending to show that Mrs. Dickel was in apprehension of death because of some existing condition of body or some impending peril, but even if the fact were otherwise, there was no evidence tending to show that any such apprehension was the moving cause of the transfer.

The court instructed the jury (Trans. 169), that they had the right to take into consideration the age of Mrs. Dickel, her physical and mental condition, the character of the trust, the beneficiaries under it, and the execution of the wills. But there was nothing in the age of Mrs. Dickel, nor in her physical or mental condition, nor in the character of the trust or the beneficiaries under it, nor in the execution of the wills, which tended to create such apprehension as may be said to arise from an *existing* condition of body or an *impending* peril.

It is well settled that the court may withdraw a case from the jury altogether and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict in opposition to it.

Patton vs. Texas and Pacific Railway Co., 179 U. S. 658. In the above case it is remarked, by Mr. Justice Brewer, at p. 660:

“The judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility.”

(b) Even if the court were justified in refusing to adopt the definition of the term “in contemplation of death”, for which we contend, there was no evidence from which the jury was warranted in inferring that,

when the deed of trust was executed, Mrs. Dickel expected or anticipated that her death would occur before the expiration of her normal expectancy of life. She therefore did not expect or anticipate the occurrence of her death in the immediate future; and if her anticipation or expectation of death at the termination of her expectancy may be said to be an anticipation or expectation of death in the reasonably distant future, this court will surely perceive the necessity of revising the definition so given by the trial judge to the jury.

If Mrs. Dickel believed her health to be at least normal, and expected to live for several years at least, and yet it is competent for the jury to find that she made the transfer "in contemplation of death", it is difficult to conceive any state of the proofs which would justify the direction of a verdict for plaintiff.

V.

Prejudicial Errors were committed in the admission and exclusion of evidence.

In preceding Division IV hereof, we have entered into a discussion of the meaning of the term "in contemplation of death" and have endeavored to point out the errors committed by the trial court in defining that term and in submitting the question to the jury when there was no evidence sufficient to justify a verdict for defendant. We shall now consider some of the evidence erroneously admitted or excluded at the trial which prejudiced the jury and led to their extraordinary verdict which was not based on any competent evidence.

(a) *The court refused to receive competent evidence as to the mental and physical condition of Mrs. Dickel at the time of the execution of the deed of April 21, 1915.*

The trial judge refused to permit the witness, Charles P. Spicer, Vice-President of the Detroit Trust Company

(Trans. 26), who talked with Mrs. Dickel prior to the execution of the trust for the express purpose of ascertaining her mental condition (Trans. 29), to testify in answer to the question:

“Was there anything that occurred, so far as you could judge from Mrs. Dickel’s appearance or actions, that led you to think that her death was in anywise impending at that time?”

(Trans. 30; Assignment of error 1; Trans. 213, 254-255).

To be sure Mr. Spicer was not a medical expert. But a layman, talking with Mrs. Dickel for the very purpose of discovering her condition, we submit, was competent to answer as to whether, at this important conference, she said anything to indicate a fear that death was impending. Mr. Spicer was thus prevented from testifying with respect to one of the most vital issues in the whole case.

The only answer of the Circuit Court of Appeals to our contention was (Trans. 246):

“The witness Spicer was not shown competent to answer the question put to him.”

The question put to him was not one which required expert medical opinion.

But the trial court did not limit the exclusion of testimony to lay witnesses. The trial judge refused to permit Miss Maude Schell, the trained nurse (Trans. 56), who was in the same household with Mrs. Dickel at the time of the execution of the deed of trust (Trans. 56), to testify as to whether there was anything especially depressing Mrs. Dickel (Trans. 57; Assignment of error 2; Trans. 213, 255); and the court also refused to permit Dr. Oughterson, Mrs. Dickel’s physician (Trans. 60), to testify as to the disposition of old people, if everything

is going well, to see no reason why they should not live on indefinitely (Trans. 66-67; Assignments of error 4, 5, 6 and 7; Trans. 214-215, 255-256). Dr. Oughterson was of course competent to answer such hypothetical questions; and his answers excluded by the trial judge had a very strong bearing upon the case, especially in view of the fact that the court ruled (Trans. 164) that the age of Mrs. Dickel was evidence for the jury that she intended to make the gift in contemplation of death, and also charged the jury to take her age into consideration (Trans. 168-169). Medical expert opinion as to the mental condition of elderly people, was therefore of the most important bearing, and yet the plaintiff was forbidden by the judge from the advantage of having the jury properly instructed by an expert upon this vital subject.

The Circuit Court of Appeals' only reason assigned for sustaining the exclusion of testimony of this sort was with respect to the witness Spicer, because he was not "shown competent" (Trans. 246). Dr. Oughterson and Miss Schell were of course competent and the Court of Appeals omits mention of them, and the very reason assigned with regard to Spicer showed that error had been committed with regard to Dr. Oughterson and Miss Schell.

The trial judge also refused to permit Mr. Shwab to testify as to whether he had any expectation in 1915 that Mrs. Dickel was in danger of passing away (Trans. 83; Assignment of error 16; Trans. 216, 258), and Mr. Ver-trees, who prepared the deed of trust and was Mrs. Dickel's attorney (Trans. 102) was denied the right (Trans. 106) to testify that this very deed of trust was not executed by reason of any fear or apprehension of impending death (Assignment of error 17; Trans. 216-217, 259).

Again the Circuit Court of Appeals in affirming the exclusion of the testimony refers only to one witness, Mr. Shwab (Trans. 246), and omits to mention Mr. Ver-trees, who, as Mrs. Dickel's attorney, was in a better position to know about her intent than anyone else.

(b) *The court permitted Mr. Shwab to be examined concerning confidential income tax returns made by himself and as agent of Mrs. Dickel.*

At the outset of the defense, Mr. Walker, the United States District Attorney, in the opening statement to the jury (Trans. 113-114), referred to the confidential income tax returns made by Mr. Shwab for himself and for Mrs. Dickel and as executor of Mrs. Dickel's estate, and from these returns he stated that he proposed to show that Mrs. Dickel and not Mr. Shwab received the income from the trust after its creation and that there was therefore outside the instrument an agreement that Mrs. Dickel was to receive the income and that, for this reason, the trust instrument was not to take effect in possession or enjoyment until her death.

The court properly found (Trans. 163), that the fact of this income tax return so inadvertently made did not show the gift was made to take effect in possession or enjoyment at Mrs. Dickel's death; and the judge charged the jury (Trans. 167), that the transfer of April 21, 1915, was absolute and that no possession or control was retained by Mrs. Dickel.

Immediately upon the disclosure by Mr. Walker that he possessed without authority and intended to use the income tax returns in a manner not permitted by law, plaintiff moved (Trans. 114-116), that the original income tax returns be directed by the court to be returned forthwith to the Commissioner of Internal Revenue and that the certified copies be also returned or delivered up to

the plaintiff. The motion so made was upon the authority of *Weeks vs. United States*, 232 U. S. 383, and *People vs. Marxhausen*, 204 Mich. 559.

No authorization was produced from the Secretary of the Treasury to use the returns (Trans. 117), and, inasmuch also as this was not a suit between plaintiff and the United States, the court ruled (Trans. 118-121) that the returns would not be received in evidence. This was clearly in accord with Sec. 257 of the Income Tax Law which provided that returns "shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President." Under this statute the regulation had been made (Art. 227, Regulations 33, Rev. Jan. 2, 1918), that returns could be used solely in suits concerning income taxes assessed on the basis of the return and "by special permission of the Secretary of the Treasury" in any suit in which the United States Government and the person making the return "are parties."

The court did not order the return of the income tax returns to the Treasury Department, but merely refused to receive them in evidence (Trans. 120-121). Plaintiff did not except to this ruling, believing that his motion had been substantially granted. However, the trial court later in effect reversed this ruling and permitted defendant on cross-examination of Mr. Shwab to inquire into these confidential returns and to show that some \$18,000 of income from the Detroit Trust Company had been included as a part of Mrs. Dickel's income (Trans. 134; Assignments of error 26 and 27; Trans. 218, 260). This came after a series of questions over plaintiff's objections upon the immaterial subject of where the income from the trust was kept (Assignments of error 20, 21, 22 and 23; Trans. 217, 259-260). This resulted in a forced

disclosure of confidential matters concerning which the District Attorney had obtained information in an unauthorized manner. If he had not obtained the returns in a way not permitted by the law and regulations, he would not have been able to ask the questions which he did. The court ruled that the evidence proffered did not suffice to raise a question which would be submitted to the jury (Trans. 120), and yet nevertheless permitted its introduction (Trans. 134).

The prejudicial nature of this irrelevant and incompetent testimony is at once apparent. Although it later appeared that the return had been the result of mistake (Trans. 134-136), and had resulted in an advantage to the Government in the amount of the tax collected (Trans. 136), nevertheless, the effect remained upon the jury of the District Attorney's opening statement, which the court allowed him to substantiate in some measure by this cross-examination of Mr. Shwab. Although the court did charge the jury later that the deed of trust was absolute (Trans. 167), he did not charge the jury that they could not determine that the transfer was made to take effect in enjoyment or possession at the death of Mrs. Dickel, but refused plaintiff's request to this effect (Trans. 157, 170; Assignment of error 43; Trans. 220); and likewise refused plaintiff's request concerning the income tax returns and instructing the jury that the item of interest returned as part of Mrs. Dickel's income did not tend to show that the deed of trust of April 21, 1915, was intended to take effect in enjoyment or possession at or after her death, or was made in contemplation of death (Trans. 159, 170; Assignment of error 50, Trans. 223).

The jury was accordingly left to determine, as a result of prejudice, that certain confidential income tax returns

improperly called to their attention, were, if not fraudulent, at least competent evidence that the transfer of date April 21, 1915, had been made to take effect at or after Mrs. Dickel's death or in contemplation of death. Not only was injustice thus done to plaintiff in the instant cause, but the door was opened wide for officers of the Government, in open disregard of the provisions of law concerning the privacy of income tax returns, to make them public without permission or warrant of law, to the prejudice of citizens of the United States, in cases in which the question of income tax covered by the return is not in issue. To this extent did the officers of the Government go in order to win the verdict of the jury in the court below, and we believe the verdict to have been the direct result of prejudice thus produced.

The Circuit Court of Appeals' only comment upon this error was that the objection in the first instance was only that the testimony was "immaterial" and that while later the objection was made also on the ground of incompetency, the ground of incompetency was not stated and no motion was made to strike testimony already given (Trans. 247). The reason for objection on ground of incompetency had been fully argued previously on the motion concerning the tax returns (Trans. 114-118). This technical reasoning of the court furthermore overlooks the fact that by proper request to charge the matter was again clearly raised, the charge denied, and exception thereto taken (Trans. 159, 170, 223).

(c) *The District Court erroneously permitted the defendant to introduce a large amount of immaterial but highly prejudicial evidence concerning taxation matters in Tennessee; and the Circuit Court of Appeals sustained this action.*

We believe it may truthfully be said that the defendant in this case made no real attempt to produce any evidence that Mrs. Dickel's death was impending in April, 1915, and that she, therefore, made the transfer of April 21, 1915, in contemplation of death. Defendant was entirely unable to produce a shred of evidence upon this score in contradiction of the clear evidence of plaintiff's witnesses that Mrs. Dickel's health was excellent and that the transfer was not made in contemplation of death. The defense, therefore, in an attempt to prejudice the jury, degenerated not only into a use of incompetent and irrelevant income tax returns, as we have pointed out in preceding subdivision (b), but also into a long discussion of Tennessee tax matters with a view to showing to the jury that Mrs. Dickel had tried to escape taxation in Tennessee. This was not true, but even if true, had no bearing upon the question of whether or not the transfer of April 21, 1915, was made in contemplation of death.

Thus, in the cross examination of Mr. Shwab, over plaintiff's objections, the court permitted the witness to be asked as to what taxes had been paid by or for Mrs. Dickel in Tennessee upon the bonds afterwards placed in trust (Trans. 122-123; Assignment or error 18, Trans. 217, 259), and Mr. Shwab was compelled to answer the question (Assignment of error 19, Trans. 217, 259). Defendant's Exhibits 1 and 2 (Trans. 207-212), consisting of various assessment notices were accepted in evidence over plaintiff's objection (Trans. 139; Assignments of error 28 and 29, Trans. 218, 261). The defendant then entered upon a long series of questions to the witnesses, Hume Jones, A. D. Bell and Vernon H. Sharp, all local tax officers of Tennessee, concerning the personal tax assessment of Mrs. Dickel, Mr. Shwab and George A.

Dickel and Company over a number of years. These matters are covered by Assignments of error 30 to 37 (Trans. 218-219, 261-262), inclusive, and the testimony referred to appears specifically on pages 139, 146, 147 and 148 of the Transcript and also elsewhere throughout the testimony of these three witnesses, the plaintiff having been granted general exceptions to this line of testimony (Trans. 139, 146).

The burden of this testimony was to show that Mrs. Dickel had not paid any taxes upon the bonds in Tennessee prior to the creation of the trust. This Mr. Shwab had freely conceded (Trans. 91) in his deposition prior to the opening of the defense. It did appear, however, that the bonds had paid a Tennessee tax at a valuation of \$20,000 while they still stood in the name of George A. Dickel & Company or Mr. Shwab prior to Mrs. Dickel's being assigned her share and the creation of the trust (Trans. 125, 146, 211, 212). There was, therefore, no possible legitimate reason for introducing all the evidence by defendant in support of the admitted fact that Mrs. Dickel had not paid a tax in Tennessee upon the valuation of the bonds. The sole purpose of the evidence was to create prejudice in the jury, by showing that notices of assessment and demands for returns were made upon Mr. Shwab and that nevertheless no taxes were paid. To rebut this prejudicial inference, plaintiff was not permitted to show that practically all tax-payers who received a demand from the city assessor to return a statement of property, failed to make a return and permitted the assessor to fix a valuation, if any, himself, if he so desired (Trans. 150-151; Assignment of error 38, Trans. 219, 262).

This evidence of defendant had no bearing upon the question of whether or not Mrs. Dickel had made the transfer of April 21, 1915, in contemplation of death.

The evidence in the case (as we have specifically pointed out in the foregoing statement of facts) showed that the reason for the transfer was to take advantage of the tax laws of Michigan. It was conceded that Mrs. Dickel had not paid taxes in Tennessee (Trans. 91). But the taxation rate in Tennessee was increasing (Trans. 137, 142); and of course a higher valuation might at any time have been made on Mrs. Dickel's property (Trans. 137). Furthermore, as defendant's evidence strongly showed, it was highly unsatisfactory to receive demands for tax returns and disregard the same. The testimony of the assessing officers shows that the bonds were liable at any moment to assessment at a large valuation. (See paragraph 27 of Statement of Facts.) Nothing that defendant produced in any way disputed plaintiff's testimony as to the reason for the transfer by Mrs. Dickel. The sole purpose of defendant's evidence was to prejudice the jury. This purpose was further fulfilled by the refusal of the trial judge to grant plaintiff's request to charge the jury that Mrs. Dickel was lawfully entitled to make the transfer to the Detroit Trust Company and thus obtain the benefit of the Michigan laws (Trans. 157, 170; Assignment of error 48, Trans. 222, 265).

The only statement of the Circuit Court of Appeals, in passing upon these many important assignments of error, was, "It was material to show that neither Mr. Shwab nor Mrs. Dickel had paid any taxes in Tennessee, or were liable to be required so to pay, in view of the fact that such liability had been put forward by plaintiff's counsel as the reason for making the trust deed in question" (Trans. 247). With all deference, we insist that this evidences a misunderstanding of the matter upon the part of the Court. We did not object to the testimony on the ground that it tended to show Mrs. Dickel had not

paid a tax on the full value of the bonds in Tennessee. That had been admitted (Trans. 91). As to Mrs. Dickel's being "liable to be required so to pay," that was a question of the law of Tennessee, and the liability was admitted by plaintiff and testified to by Mr. Vertrees and Mr. Shwab as the very reason for making the trust conveyance in order lawfully to take advantage of the more favorable Michigan statute. Defendant's witnesses did not testify, as the Circuit Court of Appeals seems to have understood, that Mrs. Dickel was not "liable to be required" to pay. On the contrary, their testimony was that she *was* liable and that she or Mr. Shwab had been called upon for returns. The testimony was offered solely for the purpose of prejudicing the jury in trying to show that although there was a liability for Tennessee taxation Mrs. Dickel had attempted to escape it. This had nothing to do with the issue in this case. The trial court's admission of such testimony and its refusal to charge thereon as requested greatly prejudiced plaintiff's case.

Respectfully submitted,

WILLARD F. KEENEY,
ROGER C. BUTTERFIELD,
JULIUS H. AMBERG,

Attorneys for Plaintiff in Error.



Dickel and Company over a number of years. These matters are covered by Assignments of error 30 to 37 (Trans. 218-219, 261-262), inclusive, and the testimony referred to appears specifically on pages 139, 146, 147 and 148 of the Transcript and also elsewhere throughout the testimony of these three witnesses, the plaintiff having been granted general exceptions to this line of testimony (Trans. 139, 146).

The burden of this testimony was to show that Mrs. Dickel had not paid any taxes upon the bonds in Tennessee prior to the creation of the trust. This Mr. Shwab had freely conceded (Trans. 91) in his deposition prior to the opening of the defense. It did appear, however, that the bonds had paid a Tennessee tax at a valuation of \$20,000 while they still stood in the name of George A. Dickel & Company or Mr. Shwab prior to Mrs. Dickel's being assigned her share and the creation of the trust (Trans. 125, 146, 211, 212). There was, therefore, no possible legitimate reason for introducing all the evidence by defendant in support of the admitted fact that Mrs. Dickel had not paid a tax in Tennessee upon the valuation of the bonds. The sole purpose of the evidence was to create prejudice in the jury, by showing that notices of assessment and demands for returns were made upon Mr. Shwab and that nevertheless no taxes were paid. To rebut this prejudicial inference, plaintiff was not permitted to show that practically all tax-payers who received a demand from the city assessor to return a statement of property, failed to make a return and permitted the assessor to fix a valuation, if any, himself, if he so desired (Trans. 150-151; Assignment of error 38, Trans. 219, 262).

This evidence of defendant had no bearing upon the question of whether or not Mrs. Dickel had made the transfer of April 21, 1915, in contemplation of death.

The evidence in the case (as we have specifically pointed out in the foregoing statement of facts) showed that the reason for the transfer was to take advantage of the tax laws of Michigan. It was conceded that Mrs. Dickel had not paid taxes in Tennessee (Trans. 91). But the taxation rate in Tennessee was increasing (Trans. 137, 142); and of course a higher valuation might at any time have been made on Mrs. Dickel's property (Trans. 137). Furthermore, as defendant's evidence strongly showed, it was highly unsatisfactory to receive demands for tax returns and disregard the same. The testimony of the assessing officers shows that the bonds were liable at any moment to assessment at a large valuation. (See paragraph 27 of Statement of Facts.) Nothing that defendant produced in any way disputed plaintiff's testimony as to the reason for the transfer by Mrs. Dickel. The sole purpose of defendant's evidence was to prejudice the jury. This purpose was further fulfilled by the refusal of the trial judge to grant plaintiff's request to charge the jury that Mrs. Dickel was lawfully entitled to make the transfer to the Detroit Trust Company and thus obtain the benefit of the Michigan laws (Trans. 157, 170; Assignment of error 48, Trans. 222, 265).

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paid a tax on the full value of the bonds in Tennessee. That had been admitted (Trans. 91). As to Mrs. Dickel's being "liable to be required so to pay," that was a question of the law of Tennessee, and the liability was admitted by plaintiff and testified to by Mr. Vertrees and Mr. Shwab as the very reason for making the trust conveyance in order lawfully to take advantage of the more favorable Michigan statute. Defendant's witnesses did not testify, as the Circuit Court of Appeals seems to have understood, that Mrs. Dickel was not "liable to be required" to pay. On the contrary, their testimony was that she *was* liable and that she or Mr. Shwab had been called upon for returns. The testimony was offered solely for the purpose of prejudicing the jury in trying to show that although there was a liability for Tennessee taxation Mrs. Dickel had attempted to escape it. This had nothing to do with the issue in this case. The trial court's admission of such testimony and its refusal to charge thereon as requested greatly prejudiced plaintiff's case.

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Attorneys for Plaintiff in Error.




Office Supreme Court, U. S.

WILMINGTON

FEB 8 1922

WM. R. STANSBURY

CLERK

No.  200

In the Supreme Court of the United States

OCTOBER TERM, 1921

VICTOR E. SHWAB, Executor, etc., Plaintiff in Error,

vs.

**EMANUEL J. DOYLE, U. S. Collector, etc., Defendant
in Error.**

SUPPLEMENTARY BRIEF FOR APPELLANT.

**JOHN J. VERTREES and
WILLIAM O. VERTREES,
Attorneys.**

EDWIN S. BARTON

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DATES

April 21, 1915—Deed of Trust to Detroit Trust Company executed.

May 26, 1915—Mrs. Dickel, Mrs. Shwab and Mr. Shwab make wills.

September 8, 1916—Estate-Tax Act of Congress passed.

September 16, 1916—Death of Mrs. Dickel.

October 16, 1916—Mr. Shwab qualifies as executor.

December 15, 1917—The tax (\$56,546.81) paid under protest.

December 21, 1917—Appeal to U. S. Comm. Int., Revenue.

May 27, 1918—Appeal denied.

July 30, 1918—This suit brought.

February 24, 1919—Retroactive Act passed.

July 1, 1919—Judgment for defendant.

December 10, 1920—Judgment affirmed by C. C. A.

In the Supreme Court of the United States

OCTOBER TERM, 1921

No. 681.

VICTOR E. SHWAB, Executor, etc., Plaintiff in Error,

vs.

EMANUEL J. DOYLE, U. S. Collector, etc., Defendant
in Error.

SUPPLEMENTARY BRIEF FOR APPELLANT.

May it Please the Court:

This is a suit by the executor of a decedent against an United States Collector of Internal Revenue, to recover \$56,548.41 exacted and collected by the Collector as an "estate" tax, by virtue of the Act of Congress passed September 8th, 1916, imposing "estate" taxes. The tax was paid under protest, and this suit then brought to recover it. There was a judgment in the District Court in favor of the collector. That judgment was affirmed on appeal by the Circuit Court of the United States for the Sixth Circuit, and is now sought to be reversed by the executor, the appellant.

THE CASE

On the 21st day of April, 1915, Mrs. Augusta Dickel, a childless widow, executed a deed of trust to the Detroit Trust Company, whereby she conveyed property

worth about \$1,000,000.00 in trust, for the use and benefit of certain named beneficiaries. It *reserved no interest* to Mrs. Dickel, took *immediate* effect, and was accompanied by *delivery* of the property conveyed. It was voluntary and without monetary consideration. (Opin. C. C. A., Rec., p. 234.)

The Act of Congress under and by virtue of which the tax was imposed and collected, was passed September 8th, 1916—*more than sixteen months after the transfer was made.*

Mrs. Dickel died September 16th, 1916.

The tax on the estate of which Mrs. Dickel *died* seized, amounted to \$31,242.12, and was paid without question: but Collector Doyle claimed that the conveyance made to the Detroit Trust Company, April 21st, 1915, had been made "in contemplation of death" within the meaning of the Act, and demanded \$56,548.41 more. This amount was paid under protest December 15th, 1917, and this suit was brought by Mrs. Dickel's Executor in the Southern Division of the District Court of the United States for the Western District of Michigan, to recover it.

A motion was made by the plaintiff, the executor of Mrs. Dickel, in the District Court (and in the absence of the jury) for a directed verdict, but the motion was disallowed. In an opinion then delivered by the trial judge (Sessions, J.,) his interpretation or

construction of the Act of Congress is given. (Rec. p. 172.)

The jury was then brought in and charged, and the question whether the deed of trust had been made "in contemplation of death" submitted. The trial judge instructed the jury as to the nature of a transfer made "in contemplation of death," and refused certain instructions with respect thereto which the plaintiff's attorneys requested to be given—and which are stated at pages 156-60 of the record.

The jury found, *under the charge*, that the transfer had been made "in contemplation of death," and there was a judgment for the Collector accordingly.

The judgment of the District Court was affirmed by the Circuit Court of Appeals—which action the Appellant now seeks to reverse.

The case has been fully stated and the errors complained of assigned, in the brief of Messrs. Butterfield, Keeney & Amberg. Certain of the errors assigned involve a consideration of the evidence, and inasmuch as our Mr. John J. Vertrees prepared the deed of trust, and testified as a witness, we have not joined in that, the principal, brief.

Deeming it allowable however for us to discuss certain questions of *law*, we respectfully request to be allowed to present this brief, in which no question of fact is discussed, and which is restricted to the con-

sideration of certain of the legal questions raised by the errors assigned. They are as follows:

PROPOSITION I. A transfer is to be regarded as having been made "in contemplation of death," within the meaning of the federal estate tax act of 1916, only when made through an apprehension of death arising from some *existing* condition of body, or some *impending* peril; and the values of property so transferred "in contemplation of death," are included in the "gross" estate of the decedent, solely to prevent and avoid evasions of the tax, and not because they *are* a part of the "gross" estate. To avoid and prevent evasions such transfers are *treated* as if they had never been made.

PROPOSITION 2. The federal estate tax of 1916 is not retroactive in operation.

PROPOSITION 3. If that act be retroactive, it is unconstitutional and void as to the transfer made by Mrs. Dickel, because it was made more than one year before the statute was enacted.

PROPOSITION I, as to the construction of the act, is presented by Errors No. 44, page 220 of the record; No. 45, page 221; No. 46, page 221; No. 47, page 221; and No. 63, page 226; No. 58, page 224; and No. 59, page 225.

PROPOSITION No. 2. as to the non-retroactive

operation of the statute, is presented by Errors Nos. 43, page 220; and No. 55, page 224, of the record.

PROPOSITION No. 3, as to the unconstitutionality of the statute, if it be retroactive in operation, is presented by Error No. 52, page 223 of the record.

The District Court construed the statute to be prospective, and not retroactive in operation, but held and charged that it imposed the estate tax only on the property which Mrs. Dickel actually *possessed* at her death, "regardless of *its value*;" that it *measures* the tax by including values previously transferred "in contemplation of death;" and, that inasmuch as such a tax may be measured or determined by any standard Congress may be minded to adopt, this tax is valid.

The views of the trial court are given in the extracts from the opinion and the charge, set out on page 76 hereof.

The view of the Circuit Court of Appeals (as shown at page 79 hereof) was that the statute *is* retroactive: that the words "every," "any," and "at any time made," evince an "*all-embracing* intent" to include transfers made *before*, as well as those made *after*, the act was passed: that this court decided in 1879, in *Wright vs. Blakeslee*, (101 U. S., 174) that transfers made to take effect "in possession or enjoyment" *after the grantor's death*, are within taxing statutes, though made prior to the enactment of the

statute: that both kinds of transfers, namely (1) those made to take effect in "possession or enjoyment" at or after the death of the grantor, and (2) those made "in contemplation of death" are placed in the *same class* by the act of 1916, and *therefore* alike, are within the rule announced in *Wright vs. Blakeslee*, above stated. (See page 79 hereof.)

The propositions stated hereinbefore, and upon which we rely, will now be considered.

PROPOSITION I

A transfer is made "in contemplation of death," within the meaning of the Federal estate-tax act of 1916, when made through an APPREHENSION of death arising from some EXISTING condition of body, or some IMPENDING peril; and the values of property transferred "in contemplation of death" are included in the "gross" estate of a decedent SOLELY to avoid and prevent EVASIONS of the tax, and for that reason the transfer is TREATED as if it had not been made.

This estate-tax act was passed on the 8th day of September, 1916, and so much thereof as is material to be stated, is as follows:

SEC. 201. That a tax (hereinafter in this title referred to as the tax,) equal to the following percentages of the value of the *net* estate, to be determined as provided in section two hundred and three, is *hereby imposed* upon the *transfer* of

the *net estate* of every decedent dying after the passage of this act, whether a resident or non-resident of the United States:*

* * * * *

“SEC. 202. That the *value* of the *gross estate* of the decedent shall be determined by *including* the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

“(a.) To the extent of the interest therein of the decedent at the time of his death which, after his death, is subject to the payment of the charges against his estate and the expenses of its administration, and is subject to distribution as part of his estate:

“(b.) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, *in contemplation* of or intended to take effect *in possession or enjoyment* at or after his death, except in case of a *bona fide* sale for a fair consideration in money or money's worth. Any transfer of a material part of his property *in the nature* of a final disposition or *distribution* thereof, made by the decedent within two years prior to his death without such a consideration, shall, *unless shown to the contrary*, be deemed to have been made in contemplation of death within the meaning of this title; and

“(c.) To the extent of the interest therein held jointly or as *tenants in the entirety* by the

* All italics herein are ours.

decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent.

“SEC. 203. That for the purpose of the tax the *value* of the *net* estate shall be determined—

“(a.) In the case of a resident, by *deducting* from the value of the *gross* estate—

“(1.) Such accounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate, arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; and

“(2.) An exemption of \$50,000.00;

.

“SEC. 209. If the decedent *makes* a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a *bona fide* sale for a fair consideration in money or money's worth,) and if the tax in respect

thereto is not paid when due, *the transferee* or trustee shall be *personally* liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, shall be subject to a *like lien* equal to the amount of such tax."

As will be observed, the statute imposes a percentage tax on the TRANSFER of the "net" *estate* of every decedent dying after its passage. (§201.)

The *amount* of this tax is determined by deducting from the "gross" estate of the decedent certain specified items or credits, such as funeral expenses, mortgage debts, losses, and a statutory exemption—all enumerated in Section 203 of the act. That which remains after making the specified deductions, is called the "net" estate, and the tax is imposed on "the *transfer* of the *net estate*." (§201.)

The "gross" estate consists of and includes—

1. The property *owned* by the decedent at the time of his death, subject to the satisfaction of his debts, or for distribution; and
2. Property formerly owned by the decedent, and transferred *prior* to his death, by any transfer made "*in contemplation of death*;" and
3. Property owned by the decedent and transferred by him by any transfer made or intended to take effect "*in possession or enjoyment*" *at* or after his death; and
4. All property held by the decedent jointly

with another, or by them as tenants in the entirety.

The aggregate value of these four classes of property constitutes the "gross" estate of the decedent, and these same values, less the deduction specified in Section 203 of the act, constitute the "net" estate, the value of which is the basis on which the tax imposed on the "transfer" is to be computed.

This tax is imposed on the *transfer*—on the transaction.

It may have "different accidental names: "it may be imposed upon the *passing*, or upon the *receiving* of the estate: upon the right to transfer, or upon the right to receive, but the laws imposing these "estate," or "inheritance," or "succession" taxes, *in their essence*, all rest upon the principle that *death* is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, of the transmission *from the dead to the living*, on which such taxes are more immediately rested.

Knowlton vs. Moore, 175 U. S., 41.

Knox vs. Emerson, 123 Tenn., 509.

Dixon vs. Ricketts, 26 Mich., 215.

Randolph vs. Craig, 267 F. R., 993.

The principle of this taxation is the subjection of property, ownership of which has ceased by reason of

the death of the owner, to a diminution by the State reserving to itself a portion of the amount.

Ross on Inh. Taxation, §6.

Estate of Swift, 137 N. Y., 77.

Estate of Sanford, 26 Cal., 112.

It proceeds upon the theory that as the right to take property by devise or descent is a creature of the law, and not a natural right, the law which grants that *privilege* may impose conditions on its exercise.

Scholey vs. Rew, 21 Wall., 331.

Carpenter vs. Pa., 17 How., 463.

State vs. Alston, 94 Tenn., 674, 681.

27 Am. & Eng. Ency., 338 (2nd Ed.)

This tax is imposed on the transfer —on the transaction. Some courts hold that it is imposed because of the *passing* of the property *from* the decedent, while others regard it as imposed because of the *receiving* of the property by the beneficiary; but this is immaterial, since there can be no transfer or transaction unless *both* the right of transferring or passing the property, and the right of receiving it are exercised concurrently, and are *the* elements of the transaction. Both rights "stand on the same footing." (N. Y. Trust Co. vs. Eisner, S. C. U. S. May 16th, 1921. Adv. Opinion No. 15, 1920-1, p. 619.)

The transfer which is the subject of "estate" or "inheritance" taxation, is one and the same under

both systems. The difference results from the point of view.

When the tax is imposed on the passing of the interest in property *from* the decedent, it is denominated an "estate" tax, and when it is imposed on the *receiving* of the interest by the beneficiary, it is called an "inheritance" tax. One contemplates an old interest in property ended by death, while the other looks to a new interest created by death. (In re Inman's Estate, 199 Pac. Rep., 615, 618. Oregon, July 19th, 1921.)

The *nature* of estate taxation was fully stated and explained in *Knowlton vs. Moore*, 178 U. S., 41, and appears to be as follows:

An inheritance tax is not one on property, but one on the succession.

The right to take property by devise or descent is a creature of the law, and not a natural right—a privilege, and therefore the authority which confers that privilege may impose conditions upon its exercise. *Death* is the *generating source* from which the particular taxing power takes its being, and it is the right or power to *transmit*, or the *transmission* from the dead to the living, on which such taxes are more immediately rested. "It is the power to transmit, or the *transmission* or the *receipt* of property by death which is the subject levied upon by all death duties."

“The thing forming the universal subject of taxation upon which inheritance taxes rest, is the *transmission*, or *receipt*, and not the right existing to regulate.

Inheritance taxes are levied on the *transmission* or *receipt* of property occasioned by *death*, and from the foundation of the government have been treated as a duty or excise tax. (178 U. S., 55, 56, 57, 59, 81.)

II

Transfers Made “in Contemplation of Death.”

Property of a decedent transferred by him, it matters not how many years before his death (provided, of course, the transfer was not made prior to September 8th, 1916,) must be included in the “gross” estate, the same as if the decedent was still possessed of it at the time of his death, in all cases where the transfer was made “*in contemplation of death*.” So the all-important question arises: What sort of a transfer must a transfer be, in order to be one made “in contemplation of death?”

Undeniably that which a man has transferred or aliened during life, is no part of his estate at his death, for the reason that it has ceased to be his, and has become the property of somebody else.

Nevertheless this act requires it to be *treated* and *regarded* as his, for the purpose of “estate” taxation,

whenever it appears that the transfer was made "in contemplation of death."

It will be observed that a transfer—

1. Of a "material" part of a decedent's property.
2. In the nature of a *final* disposition or *distribution*.
3. Without consideration, and
4. Made within *two years* of the decedent's death,—

is to be "deemed" to have been made "in contemplation of death" within the meaning of the statute, "*unless shown to the contrary*." (§202.)

That is to say: when the *four* facts stated above appear as circumstances of the case, the *presumption* is raised that the transfer was made "in contemplation of death," but they do not *establish* the fact. In such a case the transfer is to be "deemed" to have been made in contemplation of death, *unless shown to the contrary*; but the statute recognizes the proposition that even though these four circumstances appear as "facts" of the case, there *may be other facts* which will outweigh and countervail those upon which the "*deem*" is based. Or, as said by Gleason & Otis with reference to the *presumption* raised by this same Federal statute where the transfer was made within the two years: "The presumption of taxability may be rebutted by proof that the transfer was *not induced by bodily or mental conditions* leading the grantor to

make a disposition of property *testamentary* in nature." (Inh. Taxation, p. 604.)

In order to interpret the statute and to understand the presence of a clause which requires property of the decedent which is not his, and of which he did not *die* possessed, to be *treated* as if it were his, it is necessary to ascertain *the reason* for its inclusion in the statute.

Many of the States have statutes imposing 'estate,' or "inheritance" taxes, and this provision ("in contemplation of death") appears in most of them. In a few, the words are defined in the statute, but in most of them they are not; but they have been defined by courts.

The California statute is, that the words "in contemplation of death" as used therein, include—

"that expectancy of death which actuates the mind of a person on the execution of his will, and in nowise shall said words be *limited* and restricted to that expectancy of death which actuates the mind of a person *making a gift causa mortis*; and it is hereby declared to be the intent and purpose of this act to tax any and all transfers which are made IN LIEU OF, OR TO AVOID the passing of property transferred by *testate or intestate laws*." (Gleason & Otis Inh. Tax., 824 (2 Ed.)

The statute did not change, but merely "elucidated" the law.

Estate of Reynolds, 169 Cal., 600.

Pauson's Estate, In re, 199 Pac. Rep., 331,
Cal., July 25th, 1921.

The statute of Nevada is the same as that of California. (State of Nevada, 1913, Ch. 266, §30.)

The Tennessee statute provides that—

“the words ‘in contemplation of death’ shall be taken to include that expectancy of death, which actuates the mind of a person on the execution of his last will and testament, it being the *intention* to include within the provisions of this act all transfers, made IN LIEU OF, or for the purpose of AVOIDING transfers by last will and testament, or by the intestate laws.” (Acts 1819, Ch. 46, §1.)

Apparently these statutes express the real purpose and object of the “in-contemplation-of-death” provision which appears in so many statutes. To prevent *evasions*, all transfers made by the decedent in lieu of, and to avoid, the transfer which results from, or which is the passing of the property of the decedent under “testate or intestate laws,” are for the purpose of the statute, treated as if they had never been made. They are called “transfers made in contemplation of death.”

The construction placed on these words (“In contemplation of death”) by the great majority of the State Courts is, that they do not refer to that general expectation commonly entertained by all persons, but

rather to that apprehension which arises from some *existing condition* of body, or some *impending* peril.

Ross on Inh. Taxation, §117.

Gleason & Otis Inh. Tax., p. 116 (2 Ed.)

The meaning of the words "in contemplation of death" has been stated by the Court of Appeals of Kentucky in the following language:

"The anticipation or apprehension of death in the ordinary and natural course of events, is not such contemplation of death as the statute has in view. The "contemplation of death" the statute speaks of, is a *present* apprehension of death arising from some *existing* condition or *impending* peril that would reasonably create a *fear* that death was *near at hand*,. as for example when the grantor is in bad health and the *compelling* thought of death is prominent in his mind, or when he is in the presence of or there is danger or apprehension of some danger or peril that might reasonably and naturally produce an expectation of death. * * *

"The statute was enacted *primarily* for the purpose of levying a tax on property *passing by will or the intestate laws* of the state from any person who might die seized or possessed of the same while a resident of the state, or if not a resident of the state, whose property so passing was within the state. It was not intended to put a tax upon all transfers or gifts of property.

"The imposition of the tax upon transfers and gifts during the life of the grantor, was *only* de-

signed to prevent the primary purpose of the statute from being defeated or evaded by gifts or transfers that might be made when death was reasonably believed to be impending, and therefore we think that when the commonwealth seeks to tax, under this statute, property transferred by deed, grant, sale, or gift, it is incumbent upon it to *show* that the person making the deed, transfer, grant, or gift, was *by reason* of the *condition* of his health, or the *presence* of some threatening danger or peril, seeking to dispose of his estate before death came; and so whether the estate is or not taxable, is a question to be determined by the facts and circumstances of the particular case." (*Commw. vs. Fenley*, 225 S. W. R. 155. Ky., 1920.)

In 37 Cyc. 1567, it is stated that—

"These provisions are intended to prevent *evasions* of the inheritance tax by distribution of property among the members of the family or others just before the death of the owner."

The purpose of this provision in estate-tax laws was stated by the Court of Appeals of New York in this language:

"If such gifts were not taxable, the provisions of the Transfer Tax Law could be nullified and rendered ineffective. To prevent such an *evasion* of the law, the statute provides that such gifts shall be taxable in the same manner as if the property constituting the gift were transferred by *will*, or under the *intestate* laws." (Gleason & Otis Inh. Taxation, 122. (2 Ed.)

And by the Supreme Court of New York, in *Mahlstedt's Estate*, thus:

"The only point to be determined is, whether the transfer was made in the *then belief* that he was not going to get well; that it was made in contemplation of his *then impending* death, and for the purpose of *defrauding* the state of the transfer tax; for *that is the essence* of the matter, and there is no presumption that a man intends to commit a fraud of any kind." (*In re Mahlstedts' Estate*, 73, N. Y. Supp., 818; 67 App. Div., 167.)

Says Mr. Ross in his work on Inheritance Taxation:

"Without a statute taxing transfers made in contemplation of death or to take effect thereon, it is very clear that many estates would pass free from taxation to the same persons to whom they would have passed had the grantor or doner made a will or died intestate, for it is not an entirely unnatural desire, and certainly not one infrequently indulged, for property owners to *attempt to evade* the inheritance tax, and transmit estates to the subjects of their bounty unimpaired; and even though the transfer is not actuated by any such motive, its *practical effect*, so far as the public revenue is concerned, is the same. It is the *purpose* of such statutes to *preclude*, so far as possible, this *evasion* of taxation, whether with fraudulent intent or not, and to secure the state its revenue on all transfers *which have their occasion* in the death of the transferer." (*Inh. Tax. Sec.*, 111.)

This is the statement in 26 Rul. Case Law 225, as to the meaning of the words "in contemplation of death:"

"It has sometimes been held that such statutes apply only to gifts *causa mortis*, and to gifts made for the purpose of evading the inheritance tax. But the sounder view is that the statutes apply to gifts *inter vivos* as well as *causa mortis*, providing they are made 'in contemplation of death,' that is an apprehension of death *arising from some existing bodily condition or impending peril*, and not the general expectation of eventual decease commonly entertained by all persons. The contemplation of death must be the impelling motive without which the conveyance would not be made, in order to subject the transfer of property to the inheritance tax. Whether a gift is made in contemplation of death so as to be subject to the inheritance tax is a question of fact." (225 S. W. R. 156.)

In Illinois, Kentucky, New York and Wisconsin, it has been determined that the words "in contemplation of death" do not refer to that general expectation commonly entertained by all persons, but rather to that apprehension which arises *from some existing condition of body or some impending peril*.

People vs. Carpenter, 246, Ill., 400.

Rosenthal vs. People, 211, Ill., 306.

People vs. Burkalter, 247, Ill., 600.

State vs. Pabst, 139 Wisc. 561.

State vs. Thompson, 154 Wisc. 320.

Commw. vs. Finley, 225 S. W. R. 151 (Ky., 1920).

Estate of Baker, 83 App. Div. Aff. 178 N. Y. 575.

In re Mahlstedt's Estate, 73 N. Y. Supp, 118; 67 App. Div. 167.

They, in effect, *construe* the words "in contemplation of death" to have the same meaning that is expressly given to them by definition in the *statutes* of California and Tennessee.

McDougal vs. Wulzen, 34 Cal. App. 21.

Estate of Reynolds, 169 Cal. 600.

The *reason* was given by Mr. Kitchin, Chairman of the Ways and Means Committee of the House—the committee that reported the bill which is now the Act of September 8th, 1916. When questioned as chairman on the floor of the House, he said:

"I will say that two-thirds of the States that have an inheritance tax, have substantially similar provisions (*meaning the provision as to transfers 'in contemplation of death'*), and if we do not have that provision in, the gentlemen can see what great fraud *could* be perpetrated upon the estate tax law." (*Vol. 53 Cong. Rec. 64 Cong.*, 10729, 10372, 10340.)

In *Binns vs. United States*, 194 U. S., 486, the court looked to the replies made on the floor of the Senate by the chairman of the Committee on Terri-

tories to ascertain the object and purpose of a statute, and after having done so, said that in the light of the chairman's statements "it would be sacrificing substance to form to hold that the *method* pursued, *when the intent of Congress* is obvious, is sufficient to invalidate the taxes." (p. 496.)

It is to be presumed that inasmuch as Mr. Chairman Kitchin referred to the provision in *state* statutes relative to transfers made "in contemplation of death," he understood those words, as used in the Acts of Congress, to mean what the state courts had construed them to mean; and that the Congress, when it used these words in the Act of 1916, used them in the same sense.

Metropolitan R. R. vs. Moore, 121 U. S., 558, 572.

Blair vs. Herold, 150 Fed. 199.

Willis vs. Eastern, etc. Co., 169 U. S. 295, 307.

As will be observed, *the* reason for including as part of a decedent's estate property which in truth and fact is *no* part of the estate: *the* reason for *treating* property parted with or aliened in a decedent's lifetime, as still belonging to him and as his at the time of his death, was to prevent and avoid *evasions*, whether fraudulent or not; to defeat transfers made in lieu of, or made to avoid, the *passing* of property which *would* be passed or transferred by testate or interstate laws.

Transfers which result from estate or intestate laws are subject to "estate" taxation. A transfer made through an apprehension of death arising from some *existing* condition of body, or some *impending* peril: made because that contemplation or apprehension was the impelling motive, without which the conveyance would not be then made, serves the purpose of a testamentary disposition. Unless the values aliened by such transfers are *treated* the same as if they were *actual* testamentary dispositions, it is obvious that whenever, from the nature of an accident, or the progress of disease, it has become apparent that the "inevitable hour" is near, the doomed one can dispose of his property by gifts and transfers in his lifetime, and thereby *altogether escape* the "estate tax" upon transfers resulting from testate and intestate laws. So, it was provided, and properly provided, that the values aliened by *such* transfers (denominated transfers "in contemplation of death") should be included in the decedent's gross estate, along with and precisely like the values or property of which he actually *died* possessed.

Just as property *given* away by a debtor will be *treated* as still *his*, for the purpose of *paying his then existing creditors*, so the values of property transferred by a decedent in his lifetime "in contemplation of death" will, for the protection of the government, be *treated* as if it still belonged to the decedent at the time of his death.

That the sole reason for including the values given away by transfers made "in contemplation of death" in the "gross" estate, is to prevent evasions; and that such transfers are, for the purposes of the statute, *treated* as if they had never been made at all, is evident from another provision of the statute. Section 202 (see page 7 hereof) provides that the values to be taken are those values which the property transferred "in contemplation of death" had, "at the time of his (the decedent's) death."

To illustrate: A transferred lands "in contemplation of death," worth \$50,000 at the time of the transfer, by a voluntary conveyance made two years before his death. Thereafter, but before A's death, those lands were found to be "oil" lands, and came to have a value of \$500,000. Although they were never worth more than \$50,000 to A, nevertheless they must be valued at \$500,000 in determining the value of his gross estate for taxation. Upon the other hand if the land so conveyed had been city property worth \$500,000 and the buildings were destroyed by fire after the transfer, but before A's death, so that nothing remained but the lot on which the buildings had stood, worth only \$500,000, it would be valued for estate taxation at this last-named sum.

The theory, and the only theory, on which this can be sustained is that the transfer is to be *regarded* as an evasion, as *in effect* a fraud on the Government,

whether so intended or not; and therefore is to be *treated* as if it had never been made. But that theory is untenable and unthinkable as to a transfer made at a time when there was no estate tax to be evaded—made months and months before even the bill which became the estate-tax act was introduced in Congress. Granting, for argument, that if the act of September 8th, 1916, *had* then been in force, this transfer could rightly be characterized as having been made “in contemplation of death,” inasmuch as the act was not in existence, to now condemn that transfer as an “evasion,” as being *practically* a fraud on the Government, whether so intended or not, is unjust, unreasonable, and unfair—is “arbitrary” within the contemplation of constitutional law.

The mere fact that a man makes his will has but little significance, for the reason that most men of prudence who have anything, keep their wills by them. They do this because of the *certainly* of death, and and the *uncertainty* of the date of its coming. Proceeding upon the *probability* that life will be of the usual length, they nevertheless provide against the *possibility* of its being cut short by accident or disease.

But the situation is altogether different in a case where there exists an *apprehension of death* because of some *existing* bodily condition or *impending* peril, and an apprehension so profound and impelling as to

cause the man to consider what he should do *with his property*, rather than what he should do *for himself*. When that is the case, when the moving cause of the transfer is the expectation or apprehension of death in the near future, that transfer is properly characterized as one made "in contemplation of death."

III

While the value of property which a decedent has transferred during life by a transfer made "to take effect in possession or enjoyment *at or after his death*," and the value of property transferred by him "in contemplation of death," are both included in the "gross estate" equally with the property of which he *dies* seized, and which is passed to others under testate or intestate laws, the two transfers are different in nature, and are included for altogether different reasons. (Gleason & Otis *Inh. Taxation*, 124.)

As already shown (see page 17) transfers made "in contemplation of death," are included in order to prevent and avoid *evasions*. Undeniably, if transfers made to take effect "in possession and enjoyment" at the *death* of the transferrer, were not brought within the operation of the estate-tax statutes, such transfers could and would be used to evade them; but that is not the principal reason for including *them*. They are included because the *passing* of the property (under such transfers) with all its *attributes* of ownership takes place at, and is dependent

upon, *the death* of the transferer. (*State Trust Co., vs. Treasurer, etc.*, 209 Mass. 373, 378.

They do not denude the transferer of the possession or enjoyment until *death*, but permit him to retain the *benefit* and *enjoyment* of the property as fully and to the same extent as if no transfer had ever been made at all. In such cases the transmission, *in effect*, is the same as if the devolution had taken place under the testate or intestate laws.

Estate of Lines, 155 Pa. St. 378.

Ross Inh. Taxation, §110.

Conceding (for argument) that in point of fact the transfer made by Mrs. Dickel in 1915 was such as to be properly characterized as one made "in contemplation of death" within the meaning of the Act of 1916, and therefore that the property so transferred in 1915 should be included in Mrs. Dickel's "gross" estate, *if the Act of September, 1916, had then been in existence*, the only ground on which its inclusion could be justified is, that it operated as an *evasion* of the Act, and for these reasons; the transfer was absolute, and took effect at once. It reserved no interest in Mrs. Dickel, and was in nowise dependent upon, or affected by Mrs. Dickel's *death*. True it is that (in the case *assumed*) the *apprehension* of death operating on Mrs. Dickel's *mind* influenced her action, and moved her to make the transfer, but the *transfer* itself, the *passing* of the title, of the posses-

sion and enjoyment, of the beneficial attribute of the property, was *independent of her death*.

Death is the generating source of "inheritance" or "estate" taxation. The theory of such legislation is that inasmuch as the dominion of the owner, and the enjoyment of the property *ends* with his life, it is allowable for the State, which grants him the power to control its disposition and enjoyment for a period *after* death, to impose a tax on the transfer or transaction which does it. So, transfers made "in contemplation of death" are included in the "gross" estate, not because they really are a part of the decedent's estate, nor because they are *dependent* upon, or in any way *determined* by the *death* of the transferer, but solely because the *apprehension* of death induces the making of transfers which *operate as evasions* of estate taxes, which otherwise would be realized.

The argument (to this point) has been made to show—

1. That it is only when the "generating source" or "moving cause" of a gift-transfer is an apprehension or expectation of death arising from some *existing* condition of body, or some *impending* peril, that it can be regarded or characterized as one "made in contemplation of death;" and that

2. The *reason* why the values of property transferred "in contemplation of death" are included in the decedent transferrer's "gross" estate, and the transfer *treated*, for the purposes of estate taxation,

as if it had not been made and the decedent was still the owner at the time of his death, is, to avoid and prevent *evasions* of the tax.

PROPOSITION.

The Act of Congress of September 8th, 1916, has only a prospective operation. It does not relate to or affect transfers made prior to its passage, even though the transferrer dies subsequent to its enactment, and the transfer be one in fact made "in contemplation of death" within the definition of the statute.

Inasmuch as the transfer now under consideration was made in April, 1915, about one and one-half years before the Act of September 8th, 1916, which imposes the estate tax, was passed, it is obvious that unless it be construed to operate retroactively the plaintiff must recover.

The rules by which the operation and construction of statutes in general, and *taxing* statutes in particular, are to be determined will now be stated.

A.

First of all the *object* and *purpose* of the Act is to be ascertained and determined. As said by this Court in *Holy Trinity Church v. United States*:

"The *object* designed to be reached by the Act must *limit* and *control* the *literal* import of the

terms and phrases employed.” (143 U. S. 457, 460.)

That case has been referred to by this Court as “a well-known example of construing a statute not to include a case, that indisputably was within its *literal* meaning, but was believed not to be within the *aim* of Congress.” (*Am. Security Co. v. Dist of Columbia*, 224 U. S. 495.)

This Court also said, speaking with reference to the construction of a statute—

“Since here, as always, the *purpose* of Congress in enacting a law is of importance in determining the *meaning* of it.” (*Street v. Lincoln, etc., Co.*, 254 U. S. 88, 90.)

In another case this Court stated that—

“There is no better way of discovering its (*the Act's*) true meaning, when expressions in it are rendered ambiguous by their connection with other clauses, than by considering the *necessity* for it, and the *causes* which induced its enactment.” (*Haydenfeldt v. Daney, etc. Co.*, 3 Otto., 634, 638.)

In whatever language a statute may be framed its *purpose* must be determined by its natural and reasonable effect.

Railroad v. Husen, 95 U. S., 465, 472.

“What is not within the purpose or meaning, nor within the mischief to be remedied by a statute, can-

not be held included in the law, even though literally the language might include it."

Boro v. Hidell, 122 Tenn., 80, 90.

Taylor v. McGill, 6 Lea (Tenn.), 294.

The intention of an act prevails over the literal sense of its terms. The particular inquiry is, not what is the abstract force of the words used, but in what sense were they intended to be used, as found in the act? This sense is to be collected from the context, and a narrower or more extended meaning given according to the intention thus enacted.

Railroad v. Byrne, 119 Tenn., 278, 332.

As said by Huddleston, Baron: "My Lords, it seems to me that in order to determine the *effect* of legislation one must look at the *object* which it had in view."

19 Q. D. B., 528.

Beal's Card. Rules of Leg. Int. of Statutes, 280.

"The *object* sought to be accomplished exercises a potent influence in determining the meaning of not only the principal but *also* the minor, provisions of a statute. To ascertain fully, the Court will be greatly assisted by knowing, and is permitted to consider, the *mischief*, intended to be removed or suppressed, or the necessity of any kind which induced its enactment." (2 Lewis Stat. Const., Sec. 456, 2 Ed.)

"The purpose is to get at the meaning of the

words, and fortunately there are well-known rules to assist the process. The first of these is the *motive* of the law. Whatever construction advances *that*, carries a presumption of truth." (218 U. S., 224.)

B.

A statute will be construed as prospective, and as operating *in futuro* only, unless the legislative intent that it shall also have a retroactive operation is expressed in language *too clear to admit of a reasonable doubt*.

The rule has been stated by this Court in the following terms::

"It is a principle which has always been held sacred in the United States that laws by which human action is to be regulated *look forward*, and *not backward*, and are *never* to be construed *retrospectively*, unless the language of the Act shall render such construction indispensable."

Reynolds v. McArthur (1829), 2 Pet., 417, 434.

See also

United States v. Burr (1895), 159 U. S., 78.

United States v. American Sugar Refining Co., (1906), 202 U. S., 563, 577.

"Words in a statute ought not to have a retrospective application, unless they are so clear, strong and imperative that *no* other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied."

United States v. Heth (1806), 3 Cranch., 399, 413.

The rule was stated again by this Court in this language:

“The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction, *if* it is susceptible of *any* other.

“It ought not to receive such a construction unless the words used are *so clear, strong and imperative* that *no other* meaning can be annexed to them, or unless the intention of the legislature *cannot be otherwise* satisfied.”

U. S. Fidelity Co. v. Struthers Wells Co., 209 U. S., 306, 314.

Reynolds v. McArthur, 2 Peters, 417, 434.

In *White v. United States*, 191 U. S., 545, 552, this Court said:

“Where it is claimed that a law is to have a retrospective operation, such must be clearly the intention, evidenced in the law *and its purposes*, or the Court will presume that the law-making power is acting for the future only, and not for the past; that it is enacting a rule of conduct which shall control the future rights and dealings of men rather than review and affix new obligations to that which has been done in the past. . . Retrospective legislation is not favored. *Cooley on Constitutional Limitations*, 529. Retrospective laws which have been sustained in the courts have ordinarily had the effect to rem-

edy irregularities in legal *procedure, assessment* of property for taxation, and the like. (Cooley on Const. Lim., 530, 531.”)

Again:

“As a general rule for the interpretation of statutes, it may be laid down that they never should be allowed a retrospective operation when this is not required by express command, or by necessity and unavoidable implication. Without such command or implication they speak and operate upon the future only.”

Murray v. Gibson, 15 Howard, 421.

Chew Hong v. United States, 112 U. S., 539.

Said Pollock, C. B., in *Young v. Hughes*, 4 H. & N., 76:

“Nothing but clear and *express* words will give a *retrospective* effect to a statute by implication.”

Beal’s Card. Rules Leg. Int., 416.

It is an inflexible rule that a statute will be construed as prospective and operating *in futuro* only, unless the intention of the legislature to give it a retroactive effect is expressed in language *too clear, and explicit to admit of a reasonable doubt.*”

Black on Const. Proh., Sec. 179, citing 56 cases.

The general rule relating to all statutes is that they shall *never* receive a construction that will make them operate retroactively, if they are susceptible of *any* other.

2 Lewis Suth. State Const., Sec. 641 (2 Ed.).

The rule is the same both in Michigan and in Tennessee.

Board, etc., v. Board, etc., 158 Mich., 344.

Hannum v. Bank of Tenn., 1 Cold. (Tenn.), 403.

Taylor v. Rountree, 15 Lea (Tenn.), 725, 731.

C.

"Where a statute is susceptible of two constructions by one of which grave and doubtful *constitutional* questions arise, and by the other of which such questions are avoided our duty is to adopt the latter."

U. S. v. Del. & H. Co., 213 U. S., 366, 408.

U. S. v. Bennett, 232 U. S., 299, 303

"A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but *also* grave doubts upon that score"

U. S. v. Jim Fuey Moy, 241 U. S., 394, 401.

D.

Any construction that leads to *absurd* consequences should be rejected.

U. S. v. Hogg, 50 C. C. A., 608 (6th Cir.); 112 Fed. Rep., 909, 912; 111 Fed. Rep., 294.

Interstate, etc., Co. v. Board, 85 C. C. A., 532; 158 Fed. Rep., 270, 274.

State v. Smith, 40 Ark., 431.

In Re Matthews, 109 Fed. Rep., 617.

“All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an *absurd* consequence.”

U. S. v. Kirby, 7 Wallace, 482, 486.

“Where a particular construction of a statute will occasion great inconvenience, or produce inequality and *injustice*, that view is to be avoided, if another and more reasonable interpretation is present in the statute.”

Knowlton v. Moore (1900), 178 U. S., 41, 77.

E.

Statutes imposing *taxes* must be liberally construed in favor of those sought to be taxed.

Eidman v. Martinez, 184 U. S., 578, 583.

Herold v. Blair, 158 F. R., 804; 150 F. R., 199.

Bailey v. Henry, 125 Tenn., 390, 396.

McNally v. Fields, 119 F. R., 445.

In Re Reynolds, 163 N. Y. Supp., 803.

2 Black Int. of Laws, Sec. 534, pp. 994, 996.

Sec. 397, pp., 152, 153, 283.

State v. L. & N. R. R. Co., 201 S. W. R. 738.
(1918. Tenn.)

“If there be admissible in any statute what is called an ‘equitable construction,’ certainly such a construction is not admissible in a *taxing* sta-

tute where you can simply adhere to the words of the statute."

Partington v. Attorney General, L. R. 4 H. L., 100, 122. Quoted with approval by U. S. C. C. A. (8th Cir. Mo.) in *Rice v. U. S.*, 53 F. R., 910.

In *McNally v. Field*, 119 F. R., 445, 449, Circuit Judge Colt said:

"It will also be observed that a *tax* should not be imposed unless such purpose clearly appears. When a statute is susceptible of two constructions, and the intention of the legislature is in doubt, such doubt, as a rule, should be resolved in favor of the taxpayer.

"Revenue statutes are in no *just* sense either remedial laws, or laws founded on any permanent public policy, and therefore are not to be liberally construed." (Story, J.)

U. S. v. Wigglesworth, Fed. Cas. No. 16690.

Net & Twine Co. v. Worthington, 141 U. S., 474.

Rice v. U. S., 53 F. R., 910, 912; 4 C. C. A. 8th Cir. 910.

In *Gould v. Gould*, 245 U. S., 151, this Court said:

"In the intrepertation of statutes levying *taxes* it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are con-

strued most strongly against the government, and in favor of the citizen."

In *Ohio v. Harris*, 229 Fed. Rep., 898; 144 C. C. A., the Court said:

"For it is long settled and familiar doctrine, applicable to *all* forms of taxation, that the legislative body must express its intention to tax in distinct and unambiguous language; the language employed cannot be extended, by implication, beyond its clear import, and well founded doubts engendered in attempting to apply the statute must be resolved in favor of the taxpayer."

F.

In *Blair v. Herold*, 150 Fed. Rep., 201, Cross, J., said:

"A *succession* tax is a *special* tax, and an act intended to impose it must be construed most strongly against the government, and a *clear* authority for the imposition of the tax must be found in the statute."

In *Lacey v. State Treasurer*, 152 Iowa, 587, the Court said:

"The general rule is that statutes are not to be given a retroactive effect, unless required by the language employed, but it is the *specific* conclusion which has been generally reached with reference to *collateral inheritance taxes*."

Inheritance tax statutes, like all others, are generally construed as prospective, unless *expressly* declared to be retroactive in their operation.

Gleason & Otis Inh. Taxation, pp. 56-7.

Gilbertson v. Ballard, 125 Ia., 420; 101 N. W., 108.

Tilford v. Dickinson, 79 N. J. L., 302; 75 A., 574.

Provident Hospital v. People, 198 Ill., 495.

Re Lines, 155 Pa. St., 378.

Matter of Miller, 110 N. Y., 216.

Matter of Van Kleeck, 121 N. Y., 710.

Eury v. State, 72 Ohio St., 448.

The *reason* for this rule is that an *estate or inheritance tax* is not a common burden upon all the property or all the people in the State. It is a *special tax*, affecting only a special class of cases, and a citizen cannot be subjected to a special burden without clear warrant of law.

Re Euston's Will, 113 N. Y., 174.

In Re Harbeck's Will, 161 N. Y., 211.

Some cases illustrative of these rules will now be specially noticed. In *Holy Trinity Church v. U. S.*, 143 U. S., 457, it appears that the statute then under consideration provided that it should be unlawful for "*any person or corporation*" to in *any way*, assist or encourage the migration of *any alien* into this country under an agreement to perform labor or *service of any kind* in the United States; and it expressly *named* certain classes that were *exceptions*—artists, lecturers, singers, and domestic servants.

The Church of the Holy Trinity, a corporation,

contracted with an Englishman, Mr. Warren, to remove to the United States to become its pastor and preach to its congregation.

Great emphasis was laid on the word "any" and also on the fact that there were certain *specified* exceptions, and preaching was not one of them. This court said that the transaction *was* within the *letter* of the statute, but *not its object and purpose*, and therefore was not within the statute itself; and that the *object* designed to be reached by the Act must *limit and control the terms and phrases*. (143 U. S., 462.)

This Court has referred to that case as "a well-known example of *construing* a statute *not* to include a case that indisputably was within its literal meaning, but was believed not to be within the *aim* of Congress." (224 U. S., 495.)

In *U. S. v. Goelet*, 232 U. S., 293, it appeared that an Act of Congress imposed an annual tax upon *the use of every* foreign-built yacht or pleasure boat owned or chartered for more than six months, by "*any* citizen" of the United States—to be levied and collected by the collector of the district nearest the residence of the managing owner.

At the time the Act was passed, and at the time the tax became due for the year, Mrs. Goelet, a citizen of the United States, had been *permanently* residing and domiciled at Paris, France, and owned a foreign-

built yacht which had been *used* for more than a year within the jurisdiction of the United States. The question was whether Mrs. Goelet, a citizen of the United States, was liable for the tax—which of course depended upon the question whether the Act imposed the tax on non-resident citizens, who were actually residing beyond the jurisdiction of the United States.

To the argument that the Act *expressly* provided that the tax should be levied and collected upon the use of “*every*” foreign-built yacht owned or chartered by “*any citizen*” of the United States, this Court replied that it was an argument which begged the question for decision, namely, whether the use of the general words “*any citizen*” without more, should be considered as expressing more than the general rule of taxation. The Court considered that the facts that (a) the taxation of citizens having a permanent domicile abroad is rare and exceptional, (b) and that the Act provides the tax should be collected by the collector of the district nearest the residence of the owner, restricted the operation of the statute; and it held that, properly construed, the words “*any citizen*” meant those citizens *only* whose *personal residence or domicile was within the jurisdiction* of the United States.

Reiche v. Smythe, Collector, 13 Wall., 162: An act of Congress passed in 1861 exempted from import taxation “*animals, living, all kinds; birds singing and*

other, and land and water fowls." While that act was still in force, in 1866 Congress passed an act imposing an import tax on "horses, mules, cattle, sheep, hogs, and *other live animals*" imported from foreign countries. The question was whether a lot of canary birds were subject to duty as live "animals" within the meaning of the act. The Court held that they were not, and said:

"If it be true that it is the duty of the Court to ascertain the meaning of the legislature from the *words* used in the statute, and the subject-matter to which it relates, there is an equal duty to *restrict* the meaning of *general* words whenever it is found necessary to do so, in order to carry out the *legislative intention*." (P. 164.)

Silver v. Ladd, 7 Wall., 219: An Act of Congress passed in 1850 provided that there should be granted to every white settler or occupant of public lands who was a citizen or had made a declaration of *his* intention to become one, so much land "if a single man," and so much land if he was "a married man"—one-half to him, and the other half to his wife.

A *widow* with one child settled on the public lands. The question was whether she was "an unmarried man" within the meaning of the statute. The Court held that she was: that according to the *intent* of the framers of the act, the widow was a single man. That is to say, it construed the act according to its purpose. (P. 225.)

Evans v. Gore, 253 U. S., 245, construed the 16th Amendment. That Amendment provides that Congress shall have power to lay and collect taxes on incomes, "from *whatever* source derived," without apportionment among the States and without regard to any census or enumeration. That language, namely, "to collect taxes on incomes from *whatever* source derived," is broad enough to include the salaries of Judges, whatever may have been the law before it was adopted. (Holmes, J., 253 U. S., 267), but the Court held that when the context was considered in the light of the *aim* and *purpose* of the Amendment, the words did not have the "all-embracing" intent claimed for them: that the taxing power was not extended to new subjects, but *merely* removed the necessity which otherwise might exist for an apportionment among the States of taxes laid on income. (*Eisner v. Macomber*, 252 U. S., 189, 206.)

So it is here. When the *rules* for the interpretation of statutes, particularly tax statutes, are considered: when the object or "aim" of the in-contemplation-of-death clause in inheritance-tax statutes; the fact that no period of limitation is prescribed; that a *lien* for the tax is imposed on the property in the hands of the transferee to secure the payment of the tax; that evasion is not possible when there is no statute in force to evade; and that the transfer was made and all rights thereunder of possession and enjoyment fixed when it was made, sixteen months be-

fore the Act was passed—when all these things are considered, it is obvious that the words “*any* transfer,” and “made at *any* time” are not “all-embracing,” but provide for, and are to be restricted to, transfers made at any time *after the passage of the Act*, regardless of the length of time intervening between the making of the transfer and the death of the transferrer. The rules of statutory construction, the purpose or aim of the statute, the context, and justice and fairness to the citizen, preclude any construction which permits it to operate **retroactively**.*

An act of Congress passed in February, 1919, evinces that Congress itself was aware that the act of September 8th, 1916, was not retroactive—certainly that it was *doubtful* whether it was or not.

The act of 1916 was amended twice in 1917, but not in any particular material to be now noticed. (Fed. Stat. Anno., p. 311, 1918 Supp., 2 ed.)

This suit was brought in July, 1918, and the plea of Collector Doyle filed in October of that year. Thereafter in February, 1919, an act was finally passed imposing an estate-tax “in lieu” of the tax imposed by the act of 1916, as amended by the acts of 1917. The provision thereof relative to transfers made “in contemplation of death,” and transfers to take effect “in possession or enjoyment” at or after the death of the transferrer, was the same as that

* The error of the District Court as to the construction of the act is considered at page 76 hereof.

contained in the act of 1916, with this significant *addition*, namely: that the values of property so transferred, should be included in the "gross" estate, "*whether such transfer or trust was made or created before or after the passage of this act.*" (40 Stat. L. 1057, 1096.)

The contention that this provision was incorporated in the act of 1919 to "clarify" the act of 1916, or to proclaim what the Congress understood that act to mean, cannot be sustained in the face of the fact that the act of 1919 is *in lieu*, and not amendatory, of the act of 1916. But if it were otherwise: if the act of 1919 were an unequivocal declaration by the Congress of what it meant, and wished to be understood as meaning, by the act of 1916—still the fact remains that Congress itself realized that it was at least *doubtful* whether the act of 1916 is retroactive, and includes transfers made prior to its passage. (*U. S. v. Field*, 255 U. S., 265.)

The owner of property has a natural right to use and to dispose of it—to dispose of it by gift, conveyance, or sale. As the law stands he also has a "right" to dispose of it by will; but this right is a legal privilege, rather than a natural right, since it is one which the state may deny or withhold altogether.

The tax known as an "estate" tax is laid on this privilege—the privilege of passing property to others under testate and intestate laws. Obviously then,

when the *value* of property which the decedent parted with and transferred during life, in the exercise of his property rights, is, upon his death, required to be included in his "gross" estate for the purpose of subjecting it to *estate* taxation, it can justly and rightfully be included only on the ground that the transfer (though made in the exercise of a natural property right) was made under such circumstances, and was of such character as to be a *testamentary* transfer in effect and nature, and really an *evasion* of the "estate" tax, which, but for such transfer, the Government would have realized upon the decedent's death.

The Government has the right to impose an "estate" tax; and it must also have the right to protect itself against circumventions and evasions—but not to do so in violation of fundamental property rights. It may, for the purpose of "estate" taxation, rightfully include in the "gross" estate of decedents, the values of property transferred in the life time of the decedent, though transferred in the exercise of his property rights, whenever such transfer is (a) "testamentary" in nature and effect, and (b) operates as an *evasion* of the "estate" tax imposed on transfers resulting from the death of the owner, under testate or intestate laws.

Transfers having the characteristics above specified are known as transfers "made in contemplation of death." Obviously a transfer may fall within

class (a) regardless of the existence or non-existence of an "estate" tax; but it is not possible for that transfer, or any other transfer to be within class (b), that is, to operate as an evasion of an estate tax, unless there is an evasible estate tax *existent*—unless there *is* a statutory estate tax to be evaded.

And so it is here. The transfer made by Mrs. Dickel, the "values" of which are now sought to be included in her "gross" estate, for the purpose of estate-taxation, was made sixteen months *before* the statute creating and imposing the tax was enacted. That this transfer, a consummated, completed transaction in April, 1915, made in the exercise of a natural property right, was made to evade, or could operate as an evasion of, an *estate* tax created and laid in September, 1916, is preposterous. Had it been made in April, 1917, instead of April, 1915, it *could* have been an evasion—a transfer made "in contemplation of death" within the meaning of the statute. In other words, the statute is reasonable and proper if its operation is prospective, but unjust, and arbitrary, if it be retroactive.

PROPOSITION.

If, when properly construed, the estate-tax act of 1916 operates retroactively beyond the year 1916, or the fiscal year, September 1915-16, to that extent it is void for that it impairs "vested" rights, in violation

of the "due process of law" clause of the 5th Amendment to the Constitution of the United States.

The transfer made by Mrs. Dickel was a deed of gift, a conveyance in trust for the benefit of relatives, not one of whom was her *heir* at law. Her sister Mrs. Shwab was her heir. In making that conveyance Mrs. Dickel did not exercise a testamentary *privilege*, but a *right*—the right to *dispose* of property owned by her—a right constituting an indispensable element of "property," and therefore property itself. The transfer was not a will executable as a permitted privilege, but a contractual conveyance executed in the exercise of a natural property right. It was her right under the law to make that alienation or transfer, tax-free, and equally the right of the beneficiaries to receive tax-free. Moreover, upon the execution of the transfer the rights of the parties became *vested* rights, for the reason that the right to transfer on the one hand, and to receive on the other, were *exercised* in the transaction, and at once became things of the past. The transfer *made*, was an accomplished fact.

Then too, the rights of possession, of enjoyment, and of ownership, were in nowise determined by, dependent upon, or affected by, Mrs. Dickel's *death*. Whether *she* died or continued to live, did not affect or determine the rights of either the transferrer or the transferees, in the least.

That which it is claimed this tax statute retroacts

to avoid, is not an existing thing but a *transaction* that has passed away; and therefore it is obvious that, to sustain this tax, the proposition must be asserted and maintained that Congress has the power to reach back and tax a *vested right*, which was exercised, and became an accomplished fact in such exercise, more than a year before the retroactive taxing statute was enacted. As already stated, the back-taxation which was inflicted, was not the taxing of a statutory, testamentary, *privilege*, but the taxing of a natural, indestructible, exercised, *property right*.

Unquestionably such an Act is "arbitrary"—is unjust, oppressive, and unfair. Our position is that such taxation is not "due process of law," and forbidden by the Fifth Amendment; and that it can be sustained only on one ground, namely, that the *taking* power is not in anywise limited or restricted by that Amendment.

Undeniably there are *expressions* in some of the opinions of this Court tending to support the proposition that the taxing power has no limits, other than such as are specifically and in terms imposed upon it; but they are *dicta* which other opinions negative and refute. For example: In *Billings v. U. S.*, 232 U. S., 282, this appears in the opinion of the Court:

"It is also settled beyond dispute that the Constitution is not self-destructive. In other words, the power it *confers* on one hand, it does not immediately *take away* on the other; that is

to say, that *the authority* which is given in *express* terms, is *not limited* or restrained by the subsequent provisions of the Constitution, or the Amendments thereto, especially by the due process clause of the 5th Amendment." (P. 282.)

In *Brushaber v. Union Pacific R. R. Co.*, 240 U. S., 1, 24, this was said by the Chief Justice:

"So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance, since it is equally well settled that such a clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand, a taxing power, and taking the same power away, on the other, by the limitations of the due process clause. *Treat v. White*, 181 U. S., 264, 45 L. Ed. 853, 21 Sup. Ct. Rep., 611; *Patton v. Brady*, 184 U. S., 608, 46 L. Ed. 713, 22 Sup. Ct. Rep., 493; *McCray v. United States*, 195 U. S., 27, 49 L. Ed. 78, 24 Sup. Ct. Rep., 769, 1 Ann. Cas., 561; *Flint v. Stone Tracy Co.*, 220 U. S., 107, 158, 55 L. Ed., 389, 416, 31 Sup. Ct. Rep., 342, Ann. Cas. 1912 B, 1312; *Billings v. United States*, 232 U. S., 261, 282, 58 L. Ed., 596, 605, 34 Sup. Ct. Rep., 421."

As will be seen upon examination, the proposition so broadly asserted, was *not* (we respectfully submit) established by the *cases* cited to support it.

In *Billings v. U. S.*, 232 U. S., 282, the question was one of classification—whether the taxing of the *use* of

foreign-built yachts or vessels, and not taxing the use of those built in this country, was "arbitrary." The Court said it was not; and that, of course, made the consideration of other questions unnecessary.

Treat v. White, 181 U. S., 264: An Act of Congress imposed a stamp tax upon what is known as a "call" (an option to buy) among New York stock-brokers, and the question was whether a "call" was an "agreement to sell," within the terms of the Act. The Court in the first sentence of its opinion states that "the question before us is *simply* one of statutory construction." (P. 266.) As a consequence no constitutional question was involved. The Court, however, when considering the question why Congress had required agreements to sell (or "calls") to be stamped, and had not required "puts" to be stamped, said that there is a difference between an agreement "to sell" and an agreement "of sale"—a difference which Congress recognized; and that the fact that a stamp duty was imposed on one class of these agreements and not on the other, in nowise affected the validity of the tax imposed. The Court said that the power of Congress "*in this direction*" is unlimited.

We submit that this is far from declaring that the 5th Amendment is not a limitation upon the taxing power conferred by the Constitution.

Patton v. Brady, 184 U. S., 608: Patton purchased

a large quantity of manufactured tobacco from the manufacturer, in the regular course of business, and removed it from the factory to his place of business. All excise or stamp taxes had been paid. Thereafter, and while it was still in his store and *before* it had passed to customers, an Act was passed by Congress imposing another tax on tobacco, and Patton was called upon to pay \$3,062.28 as an additional tax, and he paid it under protest and sued to recover it.

The insistence was that Congress had no power to excise or tax the tobacco a second time. The Court said that it did: that Congress had the power to *increase* taxation during the year, if exigencies demanded increased expenditures: that taxation may run *pari passu* with expenditure: that the fact that taxation had been imposed with regard to conditions of peace, does not preclude subsequent taxation with reference to unexpected demands of war: that Congress can either make a loan, or tax, according to its judgment. (P. 620.) So, it was held that Congress has the same power to increase an excise tax that it has to increase a property tax,—certainly while the property is held for sale, and before it reaches the consumer. (P. 623.)

McCray v. U. S., 195 U. S., 27, 61: Congress imposed a heavy tax on colored oleomargarine, but none on colored butter, and the contention was that this was an arbitrary discrimination, violative of the due-process of law clause of the 5th Amendment. The

Court held that the discrimination was not arbitrary, but most reasonable. (P. 62.) It was also said that while the 5th Amendment qualifies the Constitution, *in so far as it is applicable*, it did not "take away" the *grant of power* to tax conferred by the Constitution on Congress, and therefore there was no violation of the due-process clause because Congress chose to impose an excise on artificially colored oleomargarine, and not upon natural butter artificially colored. (P. 61.) And the Court said that the 5th Amendment does not *withdraw* or *expressly* limit the grant of power to tax conferred upon Congress by the Constitution." (P. 63|)

Moreover the Court conceded (and not "for the purpose of argument" either) that in a case in which it appears that the abuse of the taxing power was so plain to the judicial mind that it could see that it had not been called into play for revenue, but solely to destroy some right which could not be destroyed "consistently with the principles of freedom and justice upon which the Constitution rests"—that it would be "arbitrary," and the exercise of an authority not conferred." (p. 64.)

Counsel for the Government insist that the following cases settle the question that the 5th Amendment does not in any way abridge the exercise by Congress of its power to impose taxes:

License Tax Cases, 5 Wall., 462, 471.

Pacific Ins. Co. v. Soule, 7 Wall., 433, 443.

Veazie Bank v. Fenno, 8 Wall., 533, 543.

McCray v. U. S., 195 U. S., 27, 61.

It is to be remarked however that *McCray v. United States* is the only one of these cases cited by the Chief Justice in *Brushaber v. Union Pac. R. R. Co.*, 240 U. S., 24, as supporting the proposition announced.

An examination of these cases reveals that they neither establish nor support the proposition for which they are cited.

License Tax Cases, 5 Wall., 462: In this case it appears that an Act of Congress imposed a license tax on the business of selling *liquors*, and dealing in *lotteries*.

The businesses were carried on in States in which the business was *prohibited* by State law.

In the New York cases, the *lottery* business was lawful, but in the other States it was not.

The Court said that the power to tax—

“is given in the Constitution with only *one exception*, and only *two qualifications*. Congress cannot tax *exports*, and it must impose *direct taxes* by the rule of apportionment, and *indirect taxes* by the rule of uniformity. Thus limited, it reaches every *subject* and may be exercised at discretion. But it reaches only *existing* subjects. Congress cannot *authorize* a trade or busi-

ness within a State, in order to tax it." (P. 471.)

In this same case the Court said:

"It is not necessary to decide whether or not Congress *may* in *any* case draw revenue by law from taxes on crime. *There are undoubtedly fundamental principles of morality and justice which no legislature is at liberty to disregard;* but it is equally undoubted that no court, *except in the clearest cases*, can properly *impute* the disregard of these principles to the legislature." (P. 469.)

Pacific Ins. Co. v. Soule, 7 Wall., 433: In this case it appears that an Act of Congress imposed a tax on incomes. The Pacific Insurance Company received its income in coin, the money in circulation in California, and claimed the right to pay its tax on that basis in greenbacks or currency. The tax in coin was \$5,376.00. On a currency basis it was \$7,365.00, and the company was made to pay on that basis. (P. 436.)

The Court said that *where* the power of taxation exercised by the Congress *was warranted by the Constitution as to mode and subject*, it was therefore unlimited in its *nature*; that *within the limits of the Constitution*, it was supreme in its action. It could prescribe the basis and fix the rules. (P. 443.)

Veazie Bank v. Fenno, 8 Wall., 533: In this case it appears that a tax was imposed by Congress on the circulating notes of *State* banks.

The contention was that the tax was unconstitu-

tional for that it imposed a tax upon franchises granted by a *State*—a tax so excessive as to indicate a purpose on the part of Congress to destroy the franchises of State institutions. (8 Wall., 548, 540.) But this Court held that Congress had the right to provide a *currency* for the whole country, and therefore the power to *secure* that currency by appropriate legislation; and that the judicial department had no power to limit the exercise of this acknowledged power of the legislative department. (*P.* 548.)

VII.

Upon the other hand these opinions have been expressed by Courts and writers:

Mr. Justice Field said, in *Pollock v. Farmers, etc., Co.*, 157 U. S., 599:

“As stated by counsel; there is no such thing in the theory of our national government as *unlimited* power of taxation in Congress. There are limitations (as he justly observes) of its powers arising out of the essential nature of all free governments: there are reservations of individual rights, without which society could not exist, and which are respected by every government. The right of taxation is subject to these limitations.”

As admitted by counsel representing the Government, in this case, in the Court below:

“There may, it is true, be a *seeming* exercise

of taxing power so wholly *arbitrary* as to amount to confiscation of property under the *guise* of taxation." (*Supp. Brief*, p. 40.)

The 5th Amendment provides that no person shall be deprived of his property without "due process of law." Those words are equivalent to the words "law of the land" and are intended to secure the citizen against any *arbitrary* deprivation of his rights whether relating to his life, his liberty, or his property. (*Dent v. West. Va.*, 129 U. S., 114, 124.)

Or, as said by Mr. Justice Bradley; legislation which is arbitrary, oppressive, and unjust may be declared not to be "due process of law." (*Davidson v. New Orleans*, 96 U. S., 97. Con. Opin.)

"Due process of law," said this Court in *Giozza v. Tiernon*, "within the meaning of the Amendment, is secured if the laws operate on all alike, and do not subject the individual to an *arbitrary* exercise of the powers of government." (148 U. S., 657, 662.)

In so far as "vested rights" do not fall within the provisions against impairing the obligations of contracts, and other special constitutional provisions, they are protected solely by the provision for "due process of law." (*McGehee Due Process of Law*. 155.)

In *Warren Mfg. Co. v. Aetna Ins. Co.*, 2 Paine, 501 (29 Fed. Cas. No. 117206), Thompson, J., said:

"It is a sound general principle that no stat-

ute ought to have a retroactive effect . . . A retroactive statute partakes in its character of the mischiefs of an *ex post facto law*, and when applied to contracts or *property*, would be equally unjust and unsound in principle as *ex post facto* laws when applied to crimes and penalties."

Besides the special restraints in the Constitution, there are other and more general limitations arising from the nature of our government and from fundamental principles of justice embodied in the conception of "due process of law." *So long* as the legislature acts *within these limitations* on its powers, its discretion in determining the subject and modes of taxation is unlimited, and however oppressive must be endured.

McGehee Due Process of Law, 215.

The taxing power cannot violate any radical principle, nor distort the guaranties of the Constitution under color of its exercise.

Violet v. Alexandria, 92 Va., 562, 568; 53 Am. St. Rep., 825, 829.

State v. Fuller, 34 N. J., Law, 227.

"Property" includes the right to *alienate*, as well as the right to acquire, to possess, and to enjoy.

23 A. & E. Ency. Law, 259, 261 (2 Ed.).

Hamilton v. Rathbone, 175 U. S., 421.

McGehee Due Process of Law, 141.

City of St. Louis v. Hill, 110 Mo., 527, 533.

As said by Mr. Justice Swayne in the Slaughter House Cases, the *power to dispose* of property by *deed* or by *gift* or by *sale* according to the will of the owner is included in the property itself. (16 Wall., 127.)

But the power to dispose of property by *will*, is neither a natural nor a constitutional right: it depends wholly upon statute, and may be conferred, taken away, or limited, and regulated, in whole or in part by the legislature.

Minot v. Winthrop, 162 Mass., 113; 26 L. R. A., 259.

State v. Furnell, 20 Mont., 299; 39 L. R. A., 170, 173.

A *vested* right is a right vested in a citizen to possess certain things, and to do certain actions, according to the law of the land.

Calder v. Bull, 3 Dall., 386.

McGehee Due Process Law, 142.

Lohrstropher v. Lohrstropher, 140 Mich., 560.

Cooley on Constitutional Limitations says:

“There are *express* limitations, imposed by the Constitution upon the federal power to tax; but there are *some others* which are *implied*, and which under the complex system of American government have the effect to exempt some subjects otherwise taxable from the scope and reach, according to circumstances, of either the federal

power to tax or the power of the several states.”
(*P.* 680. 7 *Ed.*)

Also:

“Having thus indicated the extent of the taxing power, it is necessary to add that certain elements are essential in *all* taxation, and that it will not follow as of course, because the power is so vast, that anything which may be done under the pretense of its exercise will leave the citizen without redress, even though there be no conflict with *express* constitutional inhibitions. Everything that may be done under the name of taxation is not necessarily a tax; and it may happen that an oppressive burden, imposed by the government, when it comes to be scrutinized, will prove, instead of a tax, to be an *unlawful* confiscation of property unwarranted by any principle of constitutional government.” (*P.* 695. 7 *Ed.*)

The phrase “vested right” implies something settled or accrued *in the past*, on which the new statute is to operate.

Black Const. Law, 543.

When a right has been consummated, so that nothing remains to fix the right of the individual to employ or exercise it, it also is known as and called a “vested” right.

McGehee Due Process Law, 143.

Moore v. State, 43 N. J. Law, 203, 243.

Or, as announced in *Farrington v. Tennessee*:

“Contracts are executed or executory. A con-

tract is executed when everything that was to be done is done, and nothing remains to be done. A grant *actually made* is within this category. Such a contract requires no consideration to support it. *A Gift, consummated, is as valid in law as anything else.*" (95 U. S., 679, 683; 4 Wheat., 578.)

A *vested* right cannot be abrogated by statute.

Choate v. Trapp, 224 U. S., 665, 675.

English v. Richardson, 224 U. S., 680.

As said by Mr. Justice Swayne:

"Rights acquired by *deed*, will, or contract of marriage, or other contract executed according to statutes subsequently repealed, subsist afterwards, as they were before, *in all respects* as if the statutes were still in force. This is a principle of universal jurisprudence. A different rule would shake the social fabric, and let in a flood-tide of intolerable evils. It would be contrary to the general principles of law and reason, and to one of the most vital ends of government." (*Osborn v. Nicholson*, 13 Wall., 654, 662.)

As will be perceived from a perusal of the foregoing extracts, those who deny that the "due process of law" clause of the 5th Amendment is in any degree a *limitation* on the taxing power of Congress, concede that the power is limited nevertheless. But they say that the limitations result from, or are imposed by, "the principles of freedom and justice" upon which the Constitution rests: or the "fundamental princi-

ples of morality and justice;" or the "essential nature of free government." (196 U. S., 94. 5 Wall., 469; 157 U. S., 599.)

But after all, these are the limitations "embodied in the conception, *due process of law*." (McGehee Due Process Law, 215.)—a provision which was designed to preserve life, liberty, and property from the encroachments of *arbitrary* power.

Moyers v. Memphis, 135 Tenn., 291.

The proposition that the taxing power of the Congress is not affected or limited by the "due process of law" provision in the 5th Amendment, as will be perceived, is based on this reasoning, namely:

To accept it as such a limitation, is to make the Constitution "self-destructive:" to cause *the* power which that instrument confers in one clause to be immediately taken away by another. For these reasons, the power to tax, given in express terms, is neither limited nor restricted by the "due process" clause. (232 U. S., 282.)

This reasoning, we respectfully submit, is fallacious. It ignores the distinction between restraint and extinction; between the qualification of a power and its revocation. Section 8 of Article 1, confers upon Congress the power to levy and collect taxes, but Section 9 of that Article provides that no capitation or other direct tax shall be laid except in proportion to a census or enumeration. Has it ever been supposed that this express limitation takes away the taxing

power, or makes the Constitution self-destructive?

Undeniably a limitation on the taxing power restrains its exercise *pro tanto*. It is conceivable that a power granted in the Constitution *might* be so limited and restricted subsequently by amendment as, *in effect*, to neutralize or exterminate the power altogether; and it is equally conceivable that a limitation might be subsequently imposed on the original grant, that would not withdraw or neutralize the power, but merely prevent its *arbitrary* exercise, or exercise for unjust ends. The 5th Amendment, which is merely a limitation upon the *arbitrary* exercise of the taxing power, cannot be emasculated by the fallacious reasoning that it does not—for that to recognize it at all, would be to take away the taxing power itself.

This “due process” Amendment *does* relate to the taxing power, and every other governmental power that can possibly be so exercised as to arbitrarily deprive any person of his life, liberty, or property. It does not say that no person shall be deprived of his property without due process of law, *except* through an exercise of the *taxing* power. It says what it *means*—that is, that *no* person shall be *deprived* of his life, or his liberty, or his property, *without due process of law*, and (by implication) that he *may* be deprived of any of them *with* due process of law.

VIII.

Assuming now that the due-process clause of the

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5th Amendment is not a revocation of, but merely a limitation on, the taxing power, the question, "Although a limitation, is it one of such reach and grasp, as phrased, as *in effect* to *take away* the taxing power itself: or is it a mere *limitation* that does no more than prevent an *arbitrary*, unfair, and oppressive *exercise* of the taxing power is presented"? It does no more than preclude an *arbitrary* exercise of the taxing power, but it does do *that*: and it is arbitrary and unjust to impose an estate-tax on any transfer made as much as sixteen months *before* the taxing statute was enacted; which was absolute, complete, and tax-free when made, and in nowise affected by or dependent upon, the *death* of the transferrer. We have said "as much as sixteen months" before estate taxation was lawful, because it seems that taxing statutes may operate retroactively with respect to particular kinds of taxation for the calendar or fiscal year: but *excise* taxation is not within these particular or expected classes.

Conceding (for argument) that excise taxes are, and that *taxing* statutes may operate retroactively, such operation is limited to one year—the current or fiscal year.

IX.

Because of the *practical* workings of the Congress, retroactivity not exceeding one year is not regarded as being "arbitrary" in tax legislation. Congress

assembles annually at a stated time. It is impossible to tell when any complex and important statute, like the revenue act, will be passed—whether during the year in which Congress convenes, or in the “fiscal” year of which the portion of the year in which Congress assembles, is a part.

And the laying and collecting of taxes is for yearly periods. A limited retroactivity is *practically* a necessity: and accordingly a tax on the *income* of the *current* year is not regarded as retroactive in a constitutional sense, even though part of that year had elapsed when the taxing act was passed. In Black on Income and Federal Tax Laws the rule is thus stated:

“On general principles and irrespective of explicit constitutional limitations, a statute imposing an income tax may subject to taxation the income of the citizen for the whole of the *current* year in which the statute is passed, that is, not only so much of the income as accrued from the date of the enactment of the law to the end of the year, but also that portion which accrued or was earned from the beginning of the year to the date of the law. For the year’s income is treated and considered as one entire thing, not as made up of several portions or items. And hence, although the statute might be called retrospective in its operation upon a part of the first year’s income, it is not retrospective *in such a sense* as to render it unconstitutional.” (Black’s Income and Federal Tax Laws, Sec. 56, p. 67.)

In *Stockdale v. Insurance Companies*, 20 Wall., 323, an act passed in 1867, imposing a tax on incomes, provided that the tax should be levied on the first day of March, and be payable on the last day of April, in every year "until and including the year 1870, and no longer." As will be observed, a tax was imposed then for the first four months of 1870. In July, 1870, an act was passed extending the tax imposed by the act of 1867 to the first day of August, 1870, and not longer. The collector assessed a tax on the Atlantic Insurance Company, on the earnings which accrued to it between the 5th day of July, 1869, and the 30th day of June, 1870—thus including, as will be noted, four months of 1870, *which were already within the operation of the act of 1867*, and two months of 1870 (May and June) that were covered retroactively by the act of July 14th, 1870. The tax was sustained.

The Court said that it was not to be doubted that Congress could impose such a tax "on the income of the *"current year,"* though *part* of the year had elapsed when the statute was passed." (P. 331.)

In *Brushaber v. Union Pacific R. R. Co.*, 240 U. S., 1, it appears that the statute under consideration was passed October 3, 1913, and provided for a yearly income tax from December to December of every year, except that for the year 1913 (the year in which it was passed) it operated retroactively from October 3rd to March 1st of that year.

As will be observed, it was retroactive as to only a

part of the *current* year. It was sustained upon the authority of *Stockdale v. Insurance Companies*, 20 Wall., 323, 331.

In *Billings v. United States*, 232 U. S., 261, it appears that an act passed August 5th, 1909, taking effect the next day, imposed an annual tax as of September 1st, on the *use* of all foreign-built or pleasure boats. Billings was the owner of such a yacht, and was using it when the act was passed, and also thereafter during 1909. The Court said that—

“conceding that the causing the tax for the *annual period* to become due in September, 1909, is to give it in *some* respects a retroactive effect, such concession does not cause the act to be beyond the power of Congress, under the Constitution, to adopt.” (232 U. S., 282.)

As will be seen, it was passed, and went into effect, *during the year* for which the tax was levied.

In *Woods v. Lewellyn, Collector*, 252 F. R., 106, U. S. Circuit Court of Appeals for the Third Circuit; the point was made for a taxpayer who had paid a tax under protest that the act, having been passed October 3rd, 1913, **could not relate back** and impose taxes on income received since March of that year and before the act was passed. It was held not to be well taken, and was disposed of in few words. Said McPherson, J.:

“That the act, although passed in October, 1913, *could* tax the plaintiff’s income from March

1st of *that year* is settled. *Brushaber v. Railroad Co.*, 240 U. S., 1: Ann. Cas., 1917 B. 713: L. R. A., 1917 D. 414." (252 F. R., 108.)

"Nor is there room for argument," said Chatfield, J., "as to the *general constitutionality* of the tax upon returns made in 1914 and extended for a certain definite preceding *period*, even though that period be *partially* prior to the date of the enactment of the law."

Edwards v. Keith, 224 F. R., 587.

Brady v. Anderson, 240 F. R., 665; 153 C. C. A., 463; Mr. Brady, a citizen of New York, died in July, 1913.

Congress passed an act October 3rd, 1913, imposing an income tax on net incomes. It provided that for the year 1913 incomes accruing *after* February 28th, 1913, (the day the 16th Amendment became effective) should be included. The Circuit Court held that the effect of making the act retroactive was the same as if it had been passed before his death. This Court refused to grant a writ of certiorari in the case. (244 U. S., 684.) It will be observed, that the act was retroactive for only a *part of the current year*; and that so far as appears, the succession had not been closed.

Retroactive taxing statutes are as obnoxious to the 5th Amendment as any other "arbitrary" legislation, with these qualifications: (1) a taxing statute is not regarded as retroactive when it does not operate beyond the current (or fiscal) year in which it was

passed: (2) and an "estate" tax is not regarded as being retroactive though passed after the death of the taxpayer, if the "succession" is *still open* when it was enacted.

We repeat, for emphasis, that the transfer made by Mrs. Dickel was *complete*. It could in nowise be affected by her *death*. It was not dependent upon either the existence or the closing up of her "succession." In no respects was it dependent upon the continuance of any legal testamentary privilege. It neither defeated nor affected any government tax or government claim. It was not made within the calendar or fiscal year, but more than sixteen months before the taxing statute was law. To permit this tax to be imposed and collected, is to violate the fundamental principles of justice and fairness which the "due process of law" clause of the 5th Amendment was designed to secure.

As said *In Re Craig* and quoted in *Hunt v. Wicht*:

"The underlying principle which supports the tax is that such right (the right of succession) is not a natural one, but is, in fact, a privilege only, and that the authority conferring the privilege may impose conditions upon its exercise. But when the privilege has ripened into a *right*, it is too late to impose conditions of the character in question, and when the *right* is conferred by a lawfully executed *grant* or contract, it is *property* and *not* a privilege, and as such is

protected from legislative encroachment by constitutional guarantee.

"It is the *vesting* in interest that constitutes the succession, and the question of liability to such a tax must be determined by the law in force at that time. . . .

"It is immaterial, so far as the question we have discussed is concerned, that it is alleged that the transfer was made "in contemplation of his death and without valuable consideration." The estate conveyed fully *vested* at the time of the delivery of the deed *in escrow*, entirely regardless of the motives of the grantor for the conveyance, and without regard to whether the transfer was without valuable consideration, and there was *then* no law imposing a tax on any such transfer."

In Re Craig, 181 N. Y., 551; 74 N. E. R., 1116.
Hunt v. Wicht, 174 Col., 961; 162 Pac. Rep., 639.

In Minnesota a transfer was made about two years before the law imposing an estate tax on transfers made "in contemplation of death" was passed. An attempt was made when the grantor died to collect the tax on this transfer, but it failed. The Court said:

"We are urged to consider seriously the evils which would result should this Court set the seal of its approval upon the transaction in question, and thus permit a great property to escape the payment of the inheritance tax. But we do not

consider that the success and effect of the inheritance tax law is involved in this case. That law is *prospective*, in its operation, and *it is beyond the power* of the State, even if it so desired, to subject to its operation, property which the owner in good faith disposed of *before* his death."

State, ex rel Probate Court, etc., 102 Minn., 268, 285.

In *Chanler v. Kelsey*, 205 U. S., 466, it appears that in 1844, 1848, 1849, and 1865 Mr. Astor of New York executed conveyances, in the nature of marriage settlements, whereby he transferred certain property to trustees, to pay the income to his daughter, Mrs. Laura Delano, for life, with remainder to her issue in fee, or in default of issue, to her heirs in fee, with power in *her*, by an instrument testamentary in character (but to be acknowledged as a deed) to "appoint" the remainder amongst her issue or heirs, *in such proportions as she saw fit*. These deeds were irrevocable, and were not made in contemplation of death. (P. 468.)

In 1897 the state of New York imposed a transfer tax on all transfers made pursuant to, and in the exercise of, *a power of appointment*, whether the power to make it was *conferred* by a conveyance made *before* or *made after* the passage of the taxing act, and that it should be taxable, and be considered the same as though the property to which the appointment related, absolutely belonged to the *donee* of the power, and had been bequeathed or devised by such *donee*, by will.

Mrs. Delano exercised the power of appointment so

conferred on her, by her last will and testament, duly acknowledged and witnessed ; and she died June 15th, 1903.

The Court of Appeals of New York, and this Court, held the tax, as applied to that case, to be constitutional. The reasoning appears to be this :

The tax is not laid on the property, nor on the *original* disposition by deed, nor on the power of appointment itself, but simply upon the *exercise* of that power by will. While the donee of the power had no interest *in* the property, it required *her act* of appointment to *transfer* that property to some of the class, and to take it from others. As the tax is imposed upon the *exercise* of the power, it is unimportant how the power itself was created. The *exercise* of the power is the important fact, since what may be done under it is not affected by its origin. (201 U. S., 477.)

The estate was affected by the taxing statute only because it became "complete" by the *exercise* of a power, *subsequent* to the passage of the taxing act. (205 U. S., 476.)

And Mr. Justice Holmes, in a dissenting opinion, in which Mr. Justice Moody concurred, said :

"But if there is no succession, or if the succession be fully vested, or has passed beyond *dependence* upon the *continuing* of the state's permission or grant, an attempt to levy a tax under the power to regulate successions *would* be an attempt to appropriate property in a way which

the Fourteenth Amendment has been construed to forbid. No matter what other taxes might be levied, a succession tax could not be, and so it has been decided in New York." (205 U. S., 480; 171 N. Y., 48, 55; 147 N. Y., 69.)

In the present case the matter had passed *beyond* dependence upon the State's permission or grant. The transfer was "complete." It was not made to take effect in possession or enjoyment upon Mrs. Dickel's death, neither did it depend upon the *exercise* of any power of appointment. It had not the slightest dependency upon Mrs. Dickel's succession. It had been *completed* months before an "estate" tax had been authorized—a tax which could be imposed on this transfer solely and alone on the ground that it was in the nature of a testamentary transfer, which operated *to evade* an estate tax.

Cahen v. Brewster, 203 U. S. 543; 8 Ann. Cas., 215; This is the case of "Succession of Mathias Levy," 115 La., 377 (8 L. E. A., (N. S.) 1121; 5 Ann. Cas., 871)—error to the Supreme Court of Louisiana:

M. Levy, a citizen of Louisiana, died May 26th, 1904, leaving a *will* whereby he bequeathed the principal part of his estate to his two nieces, Camille and Julie Cahen. The will was probated May 30th, 1904. A law was passed by Louisiana, June 28th, 1904, imposing an inheritance or estate tax on such bequests as those to the Misses Cahen. It was imposed "on all successions *not finally closed and administered*

upon, and on all succession hereafter opened." The Levy succession was *then being administered*, and was not finally closed until August 16th, 1904.

The tax was resisted by the legatees on the ground that the estate *vested* in them on the *death* of the testator Levy; that the *right* of succession was *then* (that is *before* the act was passed) *exercised*, and that the taxation of the estate was a deprivation of property without due process of law—the divestiture of a vested right.

But the Court held otherwise. It reaffirmed what had been said by the Court in previous cases as to the *nature* of the tax—that it is not a tax on property, but on the right of *succession*; but it said there was nothing in those cases to restrain the power of the State as to *the time* of the imposition of the tax.

Accordingly it was held that the State "may select the moment of death, or it may exercise its power *during any of the time it holds the property from the legatee.*" And this Court said:

"Counsel say: 'The closing of the succession cannot affect the question as to when the rights of the heirs vested; and cannot be a cause for differentiation among the heirs; and such a classification is purely arbitrary. Besides, such a classification rests on the theory that the tax is one on property, when in fact it is one on the right of inheritance.'

"But, as we understand, the Supreme Court

(*of Louisiana*) made the validity of the tax depend upon the very fact which counsel attack as an improper basis of classification. The Court decided that the property bequeathed was property the State could tax, '*until it had passed out of the succession of the testator.*' It *was certainly not improper classification to make the tax depend upon a fact without which it would have been invalid.* In other words, those who are subject to be taxed, cannot complain that they are denied the equal protection of the laws because those who cannot legally be taxed are not taxed." (203 U. S., 552-3.)

The plain intimation is that *if* the property bequeathed, had *passed out* of the succession of the testator *before* the statute was enacted, the tax would have been invalid.

Cahen v. Brewster was known in the Supreme Court of Louisiana as "Succession of Mathias Levy." That Court held that "a succession is an ideal, a juridicial person, independent from those having an interest therein"; and that "as long as the 'succession'—the ideal, or juridicial person—remains in the hands of the executors, the legislative power may classify it and subject it to a tax." It also declared that "the taxing power cannot reinstate a succession (which has been closed) for the purpose of taxation." (115 La., 377; 8 L. R. A., (N. S.) 1181.)

X.

The District Judge, in effect, concedes that if this taxing statute operates retroactively it is unconstitutional, for he says:

"If the tax here in controversy was *not* imposed on the *transfer* of the trust fund by Mrs. Dickel to the Detroit Trust Company, *then* the argument, (i. e., that Congress lacked the power to levy a tax retroactively) advanced in behalf of the plaintiff fails. (*Rec.* 161) . . . So that it seems entirely clear that Section 201 imposes the tax upon the transfer of the net estate existing and belonging to the decedent at the time of his death, while Sections 202 and 203 provide for the ascertainment of the *measure*, and thereby of the amount, of the tax which shall be imposed upon such net estate, *regardless of ITS value*. This construction of the statute gives to the language thereof its ordinary and natural meaning and removes whatever *doubt* might otherwise exist as to the *validity* of the legislation." (*Rec.* 162.)

As already shown (on page 9) while the tax is imposed on the "net" estate, the net estate is that which remains of the "gross" estate after allowing certain deductions therefrom; and the "gross" estate is ascertained and determined by including the values of property transferred "in contemplation of death" along with, and precisely like, the values of the property of which the decedent *died* possessed are included. The tax is imposed on the "transfer," and

not alone on the property of which the decedent *dies* possessed, "regardless of *its* value."

When the Trial Judge announced the construction placed by him on the statute, the attorney for plaintiff suggested that, so construed, the tax could easily be wholly evaded, since, when a man realized that death was near he could give away *all* his property so as to possess nothing at death—in which event no tax could be either laid or collected. To this the learned Judge replied:

"It is said in argument as an extreme illustration, that if a decedent, prior to his death, has transferred and conveyed *all* of his property, so that *nothing* remains, there could be no tax, because there would be nothing on which it could be assessed. *That may be true.* But even in such case, no constitutional *inequality* would be created. This statute acts alike upon all estates of the same character and in the same situation, and that is all that is required." (*Rec.* p. 163.)

"In the present case *we are not concerned* with the questions of whether a valid tax *could* have been imposed, *if the whole* of Mrs. Dickel's property had been included in the conveyance of the Detroit Trust Company, and she had *died* possessed of *no* estate, or whether the tax could have been collected from the trustee if it had not been paid by the executor. Mrs. Dickel *left* an estate of the value of approximately \$800,000, to be distributed in accordance with the provisions of her will." (*Rec.* p. 162.)

With all respect, we submit that the Court below *ought* to have been concerned with the questions with which it refused to be concerned. The Court was called upon first of all to *construe* and *interpret* an Act, which it was claimed imposed this tax on the Dickel estate, because of the fact that Mrs. Dickel once owned property which she had parted with and conveyed away, long *before* the Act was passed. And the fact that an interpretation which appeared to the Court to be correct, if logically applied to *other* cases likely to arise, would lead to illogical if not absurd consequences, *ought* to have caused it to consider well whether the *construction* which *appeared* to be correct, was *really* a sound and correct one.

What the Circuit Court of Appeals *thought* of this interpretation of the Act, is obvious. That Court, after stating *its* conclusions, remarked that it was "*unnecessary* to consider the correctness of the construction put upon the Act by the Trial Judge." (*Rec.* 239.) In this connection it may be remarked that the *injustice* of making the tax a lien upon the property in the hands of a *grantee* holding under a transfer made "in contemplation of death" (which the statute does), will not admit of the interpretation placed on the Act by the District Judge. Why should *he* be responsible under any circumstances for a tax laid only on the property which his grantor *owned* at the time of *his* death?

The view of the statute entertained by the learned

Circuit Court of Appeals is stated in the opinion in these words:

“(b). The *evident theory* of the statute is that transfers intended to take effect after the death of the grantor, as well as those made in contemplation of death, are equally testamentary in character. *Rosenthal v. People*, 211 Ill., 306, 309; *Kecney v. New York*, 225 U. S., 536. Such classification is within the power of Congress. The theory of taxation on account of transfers testamentary in character is that death is the generating source of the tax. *Knowlton v. Moore*, 178 U. S., 41, 56; *Cahen v. Brewster*, 203 U. S., 543, 550. A transfer is accordingly taxed only at the *death* of the transferrer, no matter how long the transfer may precede death. Congress has accordingly included the *two* classes of transfers in one and the same section and *subjected* them, so far as terms go, to precisely the *same treatment*. In our opinion a transfer intended to take effect in *possession or enjoyment after the grantor's death* would, under this statute be taxable, although made *before* the passage of the act. *Wright v. Blakeslee*, 101 U. S., 174, 176. The *natural inference* would be, in the absence of substantial evidence to the contrary, that *the same result* was intended as to transfers made in contemplation of death.”

“(c). While the interests derived by a grantee under an absolute and immediately effective conveyance of death are *vested*, the same is true of *any* irrevocable conveyance which takes effect in *possession or enjoyment* only upon the death

of the grantor, although in the latter case such vesting is merely *in expectancy*. If Congress had power, as we think it had, to tax both classes of conveyances, even if made before the passage of the act, no good reason suggests itself why it should desire to discriminate between the two classes of transfers." (*Rec. p. 236.*)

As will be perceived, the Circuit Court's "theory of the statute," *in substance* is this:

A transfer made to take effect "in possession or enjoyment" after the *death* of the testator, and one made "in contemplation of death" are equally testamentary in *character*, and the theory on which transfers testamentary in character are taxed is that *death* is the generating source of the tax. The case of *Wright v. Blakeslee*, 101 U. S., 174, has determined that a transfer intended to take effect "in possession or enjoyment" *after* the grantor's *death*, would, under *the* statute, be taxable although made *before* the passage of the act. Congress has in *this* act subjected transfers made "in contemplation of death," and transfers to take effect "in possession or enjoyment" *after* the grantor's death, to precisely the *same* treatment. The natural inference is that Congress intended the rule which was declared in *Wright v. Blakeslee* to apply to transfers which take effect in possession or enjoyment *after* the death of the grantor, to also apply in the same way to transfers made "in contemplation of death." *If* Congress has the *power* to do this as to one class of transfers, it has the power to do the same thing

as to the other class; and no good reason suggests itself why Congress should desire to discriminate.

We submit, and now propose to show, that

1. *Wright v. Blakeslee* does not decide, or even assume to decide, the question of the *power* of Congress to tax transfers made to take effect in possession or enjoyment *after the death* of the transferrer, *by a retroactive statute*; and

2. That the two classes of transfers are different in nature, and are included for different reasons.

As to *Wright v. Blakeslee*, 101 U. S., 174: Mr. Huntington died in 1846, leaving a will whereby he devised certain real estate to his executors in trust, for the use of his daughter Henrietta *during life*, and to her issue in fee, at her death, if she should leave *surviving* issue. The daughter died in 1865, leaving two children, both of whom were also living in 1846, when the testator died.

The act imposing a succession tax was passed in 1864—that is, after the death of the testator, but *before* the death of the life-tenant.

The statute expressly provided that every past or future disposition of real property by will, deed, or testate laws, by reason whereof any person should become entitled “in *possession* or *expectancy*” to any real estate upon the *death* of any person, *dying* after

the passage" of the act, should be deemed to be a transfer by "succession," subject to the tax.

This Court held that the *children* of the daughter *Henrietta*, the life-tenant, were liable for a succession tax upon her death. It said that up to the moment of *Henrietta's* death her children had *no* interest in the land, *except* a "bare contingent remainder, expectant upon her death, and *their* surviving her." (P. 177.)

To the suggestion that the act did not mean to embrace estates which had *already* accrued "in expectancy," before the act was passed, the Court replied that the act *expressly* includes all estates to which any one should *become* "beneficially entitled" upon the *death* of any person, dying after the passage of the act; and that "the children of *Henrietta Wright* *first* became "beneficially entitled" to the property in question at their *mother's* death. They *then* became "beneficially entitled in possession." (P. 177.)

As will be observed, the Court held that the act was *not retroactive* as to the succession; and it neither considered nor decided the question of the constitutionality or validity of a retroactive act.

The expectation or right of the remaindermen, the children of *Henrietta* the life-tenant, was a *contingent* one. The will gave the property to the trustees for the use of the testator's daughter during life, and at her decease "*if* she should leave issue surviving," to such issue in fee. (101 U. S., 175.)

As said by Wallace, J., in *Falsom v. U. S.*, 21 F. R., 37:

“A retroactive operation is not to be given by construction, so as to subject persons to a tax upon interests they may have acquired years before the law was passed . . . When a person has a *vested* remainder he has become beneficially entitled. It might be maintained *if* his interest *was contingent*, and became vested *after* by the death of *another* after the law was enacted, that he acquired a succession within the meaning of Section 127, (of the Act of 1864.)”*

It should be remarked in this connection that it is wholly immaterial in the present case, whether the children and grand-children of Victor E. Shwab, the remaindermen under the deed of trust, take *vested* interests, or *contingent* remainders, for the reason that even if the remainders be contingent, they are not contingent upon the death of *Mrs. Dickel*, the decedent and *maker of the transfer*, but are expectant upon the death of the *life-tenant* Victor E. Shwab. Not only did Mrs. Dickel transfer, and divest herself absolutely of, every possible interest, but the remainders, *if they be contingent*, are dependent upon the death of another than herself—upon the death of Victor E. Shwab, *who still survives*. *Their interests* were in no wise affected or determined by, or contingent upon, the *death* of Mrs. Dickel, the grantor.

Obviously the Circuit Court of Appeals realized

* (As it was in *Wright vs. Blakeslee*, 101 U. S., 174)

that its construction of the statute *could* work injustice, but it stood by that construction because there was not much "practical likelihood" of injury; for the Court says:

"It is true that if the tax before us is retroactive it might, at least theoretically, affect conveyances made many years before a grantor's death, but this consideration is *hardly practical*. Congress would, *we think*, scarcely be impressed with a *practical likelihood* that a transfer made many years before a grantor's death (say 25 years, to use the plaintiff's suggestion) would be judicially found to be made in contemplation of death under the legal definition applicable thereto, and without the aid of the two years *prima facie* provision." (*Rec. p. 237.*)

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 "It is not to our minds *unnatural*, nor is it *necessarily* unjust, that Congress should intend that one taking a conveyance of a *testamentary* character, *entirely without consideration*, should do so *at the risk* of having the transfer taxed, directly or indirectly, as would be the case were the transfer by will or by conveyance taking effect at or after the grantor's death." (*Rec. p. 236.*)

In substance, the Court says:

It is not necessarily unjust, nor unnatural, that one who takes a conveyance *testamentary in character*, should be required to *run the risk* of having his transfer taxed at some time in the future, since *wills* and transfers to take effect at the

grantor's *death* may be taxed by a statute at that subsequent period. Moreover "we think" there is but little "practical likelihood" that the courts and juries would be likely to go back and tax one more than two years old, anyway.

And this too in the face of the established rule that the constitutionality of a statute is to be tested by what *may* rightfully be done under it, and not by what *has* been done under it!

Montana Co., v. St. Louis, etc., Co., 152 U. S., 160, 169.

Stewart v. Palmer, 74 N. Y., 183.

Sargent v. Rutland R. R. Co., 86 Vt., 337; 13 A. L. R., 1296.

Richmond v. Carned, 14 A. L. R., 1341, 1343 (Va.).

Moore v. Otis, 275 F. R., 747, (C. C. A., 8th. Cir.).

XI

PARTICULAR ERRORS

The failure of the Court below to recognize and apply these principles resulted in certain errors, which will now be particularly mentioned.

A

THE STATUTORY "PRESUMPTION"

The trial Judge charged the jury that they should consider all the facts and circumstances, such as the

age, health, mental condition of Mrs. Dickel, etc., etc., and then said:

“By that statute Congress created a rule of evidence merely. That statute raises a presumption that if a transfer is made within two years of the death of the person making the transfer, it is presumed to have been made in contemplation of death, unless the contrary is shown; and the burden in this case is upon the plaintiff to establish by a fair preponderance of the evidence, *taking into consideration the presumption which the statute creates*, that this transfer was not made by Mrs. Dickel in contemplation of her death.”

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 “Take into consideration all of these matters and then say, from the evidence in the case, **BEARING IN MIND** *the presumption which the statute raises, and giving it the consideration to which it is entitled, and it is to be considered by you in connection with the other evidence in the case*, whether or not that transfer by Mrs. Dickel to the Detroit Trust Company, at that time, was made by her in contemplation of her death.” (Rec. 168, 169.)

The plaintiff in error excepted at the time and based the motion for a new trial, in part, on that exception; and “error” was duly assigned. (Rec. 173, 175, 225.)

The Court of Appeals held the instruction to be correct, and disposed of the exception in this language:

“The instruction that the “presumption” afforded by the *prima facie* clause of section 202 (b,) which is referred to in sub-division (a) of the first division of this opinion, could be taken into account in determining the fact of “contemplation of death” was not erroneous. (*R. R. Co. vs. Landrigan*, 191 U. S., 461, 473-4.) The provision in question raises a presumption of fact, *not* a presumption of law, and under well settled rules a presumption of fact may be taken into account in determining the ultimate fact. The presumption is merely a *rule* of evidence whose *enactment* is within the legislative competency. (*Mobile, etc. R. R. Co., v. Turnipseed*, 219 U. S., 35, 42.) The very object of a presumption of fact is to supply the place of facts. (*Lincoln vs. French*, 105 U. S., 614, 617.) Of course, a presumption can never be allowed against ascertained and established facts. But *unless* the statutory presumption may properly be taken into account in determining the ultimate fact, *it has no office*. Elements which, in the absence of evidence to the contrary, are made sufficient to conclusively establish the ultimate fact, cannot be said to have no evidentiary influence in reaching that conclusion.” (Rec. 246.)

As will be observed, the jury were explicitly told that, while considering all the evidence, they should *bear in mind the presumption* which the statute raises, and give that presumption the consideration to which it is “entitled.” They were not informed as to

the *weight* of that presumption, nor as to the nature or *degree* of consideration it was entitled to receive.

Inasmuch as a great deal of material *evidence* had been introduced, and the jury nevertheless were told to *bear* the presumption in mind, and give *it* the consideration "to which it was *entitled*," without even a hint as to the character or nature of the consideration to which it was entitled, that charge *means* that it (the presumption) *did* have weight and significance which it was their duty to regard.

This we respectfully submit is erroneous in two respects, namely, (1) that presumption was not entitled to be considered by the jury and was of no evidentiary weight whatever; (2) and even if it should have been given consideration, the Court should have instructed the jury as to its weight and significance, inasmuch as there was *evidence* in the case.

Now as to this: The statute provides that when certain specified facts appear, the transfer shall be "deemed" to have been made in contemplation of death, "*unless shown to the contrary*." Obviously if any one of the specified facts be wanting, or be not proven, the presumption (or "deem") does not exist. But when all those facts do appear or are proven, the legal presumption is that the transfer was made in contemplation of death. It is a presumption of *law* because it is created by statute. It is a deduction which the *statute* expressly provides shall be made when

certain facts appear, or are shown or proven. But the moment that any *evidence* to the contrary is given tending to prove the contrary, the presumption *disappears*, and of course its probative force departs with it.

The cases cited by the learned Court of Appeals in support of the proposition that the charge of the trial Judge was not erroneous, do not (we respectfully submit) support it.

In *B. & P. R. R. Co., vs. Landrigan*, 191 U. S. 471, the question was whether a man had stopped, looked and listened before attempting to cross a railroad track at night. It was held that, "*in the absence of all evidence*" tending to show whether the man had done so, the presumption must be that he did, and that if the evidence failed to rebut that presumption, the jury should find that the man did stop, look and listen.

In *Mobile, etc., R. R. Co., vs. Turnipseed*, 219 U. S. 35, this Court, after stating that a statute providing that proof of a certain fact should constitute *prima facie* evidence of the main fact in issue, was valid, said:

"The statutory effect of the rule is to provide that evidence of an injury arising from the actual operation of trains shall create an inference of *negligence*, which is the *main* fact in issue. The *only* legal effect of this inference is to cast upon the railroad company the duty of *producing some*

evidence to the contrary. When that is done the inference is at an end, and the question of negligence is one for the jury, upon all the evidence." (219 U. S. 43.)

In *Lincoln vs. French*, 105 U. S. 614, Mr. Justice Field said:

"Presumptions are indulged to supply the place of facts: they are never allowed against ascertained and established facts. *When these appear, presumptions disappear.*" (p.617.)

As said by Professor Thayer in his Preliminary Treatise on Evidence:

"It is one of the commonest of errors to misapprehend the scope and limitations of the ordinary rules and maxims of presumptions; and to attribute to them a mistaken quality and force. They are, as we have seen, merely *prima facie* precepts; and they presuppose only certain specific and expressed facts. The addition of other facts, if they be such as have evidential bearing, may make the presumption inapplicable. All is then turned into an ordinary question of evidence, and the two or three general facts presupposed in the rule of presumption take their place with the rest, and operate, with their own natural force, as a part of the total mass of probative matter. Of course the considerations which have made these two or three facts the subject of a rule of presumption may still operate, or may not, to emphasize their quality as evidence; but the main point to observe is, that *the rule of pre-*

sumption has vanished.” (Prel. Treat. on Evi., p. 346.)

And says Mr. Hammon:

“If, on the other hand, the party against whom a *presumption* operates, takes up the burden thus cast on him, and adduces evidence *tending* to disprove the fact assumed to exist, *the presumption is dispelled*. It becomes *functus officio*, and has no further effect in the trial, and *all* the evidence concerning the fact assumed to exist, *including* the evidence of those facts which gave rise to the presumption, is to be considered together as a whole, *without* reference to any presumption.” (*Hammon on Ev., p. 62.*)

To quote again from Mr. Thayer:

“The discrimination between presumptions of law and what are infelicitously termed presumptions of fact, however important it may be in pleading or elsewhere, is one of no special significance in the law of evidence; for all presumptions, other than the mere non-technical recognition by courts, of ordinary processes of reasoning, are the subject of rules of presumption, and these rules, of whatever varying degrees of stringency and exactness of application they may be, all of them, belong to the *law* and are *rules of law.*” (*Prelim. Treat. on Evi. p. 339.*)

It was proven, and not even disputed, that Mrs. Dickel (1) had made a transfer of a material part of her property: (2) that the transfer was voluntary and without consideration: (3) and that the transfer

was made within the two years prior to her death. But whether it was in the nature of a "final disposition or distribution," was an issue, and much evidence was introduced by the plaintiff to show the true nature and purpose of the transfer, and that it was not in the nature of a final disposition or distribution. *The presumption disappeared*, and had no force or play. As a consequence when, in that situation, the jury was specifically instructed to "*bear in mind*" the presumption, and to give to it "*the consideration to which it is entitled*" the jury could but understand that this statutory presumption had an *evidentiary* weight and significance which it was their duty to consider and regard: and that too, when it had no weight and was entitled to no consideration whatever.

B

"IN THE REASONABLY DISTANT FUTURE"

When the motion of plaintiff for a directed verdict was overruled by the District Court, the trial Judge announced that he would instruct the jury that a transfer is to be regarded as having been made "in contemplation of death" within the meaning of the Act of 1916, when the *moving cause* of such transfer was the expectation or anticipation of death either immediately, or in the "*reasonably close*" future. (*Rec. p.*, 165.)

The jury (which had been sent out) was then re-

called, and instructed that the transfer was to be regarded as having been made "in contemplation of death" if the moving cause of the transfer was the apprehension or expectation of death in either the immediate or "reasonably *distant*" future. (Rec. p. 168.) The plaintiff excepted, and assigned the exception as a ground for a new trial—which was refused. (Rec. p. 172.)

In dealing with this assignment the Court of Appeals said:

"While 'close' and 'distant' are frequently directly opposed to each other, yet *when used as here*, they are not necessarily opposed. A time which is only reasonably distant *is* reasonably close." (Rec. p., 244.)

We understand this to mean that while "close" and "distant" are generally directly opposed, yet they were not opposed *as used* by the trial Judge in his charge. Undeniably the broad and usual meaning of words is qualified by the context, and manner of use or association, in many cases; but the Court of Appeals erred in holding that such is the case here. *The two words were not used "here" at all.* True it is that the trial Judge announced in an *opinion* delivered in the *absence* of the jury, that he would instruct the jury that a transfer is made in contemplation of death when its moving cause is the expectation or apprehension of death either immediately, or in the "reasonably *close* future," but when the jury was re-

called and charged, he *substituted* the word "distant" for the word "close." It is not a case wherein it can be said that while the trial Judge used the words "reasonably close" and "reasonably distant" in the same connection, yet, *as* used by him, they mean one and the same thing, because that which is only reasonably distant, *is* reasonably close.

This view cannot be sustained, because the trial Judge did not use the word "close" in his charge, but used the word "distant" *alone*. It is not possible for the two phrases to mean one and the same thing *as used*, since both were not used. As a consequence the charge cannot be sustained on the ground stated by the Court of Appeals.

Obviously that Court did not regard its explanation as wholly convincing, since it holds, upon the authority of *N. W. Ry. Co., vs. Earnest*, 229. U.S. 114, 119, that the failure of the plaintiff's counsel to call the trial Judge's attention to the fact that he should have used the word "close" instead of "distant," was a fatal omission. It says: "Had the (*trial*) Court's attention been called to the use of the word "distant" instead of "close," *doubtless* any question of difference between the two would have been obviated." (Rec. p. 244.)

The record shows that immediately upon the conclusion of the charge, and "in the presence of the jury and before it retired," the plaintiff's counsel excepted

to that portion of the charge (*Rec. p. 172.*) and thus *did* call the trial Judge's attention to it.

The case from this Court cited by the learned Court of Appeals is wholly irrelevant. In that case the declaration alleged that the plaintiff's damages amounted to \$20,000, and asked judgment for that sum. In a paragraph of the charge which "*dealt at some length*" with the question of the measure of damages, it was said by the trial Judge, that if the verdict should be for the plaintiff he should be awarded "such an amount of damages, *not exceeding* \$20,000, as would compensate him for the injury." An exception was taken to the *entire* paragraph, without indicating wherein it was objectionable. The complaint in this Court, based on that exception, was, that it "*intimated*" to the jury that the assessment by the jury of the damages at \$20,000 was *justified by the evidence*. This Court said that when the *entire* paragraph was considered, it could not be understood by the jury as conveying any such an intimation; and besides, that if the defendant entertained the fear that the jury would be misled in that regard, it should, "*in fairness,*" have called the Court's attention to the words, to the end that they could be explained, so as to leave no doubt as to the meaning and purpose of the words.

In that case everyone *knew* that the Court did not mean to intimate to the jury the opinion that damages

should be assessed, and at \$20,000. It was not a case of an *erroneous* charge—of an instruction which the appellant deemed erroneous, but a case in which the error, if there was one, was a pure *inadvertence*; and the view of this Court was that if the appellant's counsel thought *that*, knowing as they did that the trial Court intended nothing of the kind, they should “in fairness to the Court” have brought it to the trial Judge's attention, and not have remained quiet to take advantage of an inadvertent expression which the Court would have gladly corrected, if brought to its attention. But *that* rule of “fairness to the Court” is inapplicable here. The Court intended to say the very thing it did say, because its conception was that the words “reasonably close” and “reasonably distant” do have the same meaning. Indeed the Court of Appeals declares that “while ‘close’ and ‘distant’ are *frequently* directly opposed to each other, yet *when used as here*, they are not necessarily opposed. A time which is only reasonably distant is reasonably close.”

How then can it be said that if the Court's attention had been called to the use of these words “*doubtless* any question of difference would readily have been obviated?”

Again: there was no lengthy paragraph dealing with the question. The paragraph complained of and excepted to is comprised within four lines, and only

one thing in those four lines can possibly be the subject of complaint—the words “or reasonably distant.” Specific exception was made, and a motion for a new trial based thereon, and *argued*; but the motion was overruled. (Rec. p. 172.) The Court meant and intended to say exactly what it did say to the jury; and there is no place for the suggestion of “unfairness” to the Court on the part of this appellant.

So the question is, not whether the plaintiff slipped in failing to bring the matter to the attention of the trial Judge, nor whether the phrases “reasonably close” and “reasonably distant,” “as used here,” (as used in the *charge*) are equivalent, but it is this: When a trial Judge charges a jury that a transfer is to be regarded as having been made “in contemplation of death” whenever it appears that the moving cause of its execution was the expectation or apprehension of death in either the “immediate or reasonably *distant*’ future”—what does that mean and what would a jury of ordinary men understand it to mean, and is that meaning in accordance with the law?

A word as to the nature of instructions to juries:

No instruction to a jury should be given, or be so worded as to leave the jury to *conjecture* its meaning (*Blashf. Inst., to Juries, §72.*)

The test is not the conclusion to which a lawyer in the seclusion of his office, with his books about him, or the Appellant Judge with his books and the briefs

of counsel, will come, but it is, How will the instruction be understood by the average men who compose juries?

Knapp v. Hanley, 53 Mo., App. 168; 132, S. W. R. 949.

An instruction is erroneous when so worded as to be difficult to understand, and to admit reasonably of a construction that would mislead the jury on a material point.

Branson's Inst. to Juries, p. 102.

Buel v. State, 104 Wisc., 132; 80 N. W. R. 178.

Whether an instruction is misleading, depends on how and in what sense, under the evidence, and the circumstances of the trial, ordinary men would understand it.

Branson's Inst. to Juries, p. 102.

Ga. etc., Co., v. Hamilton, etc., Co., 63, Fla. 150; 58 So. Rep. 338.

C

THE "APPREHENSION" OF DEATH

It is not so much a question of the *actual* imminence of death, as it is the *apprehension* that life's end is near. The general *apprehension* of death which all men have, due to the knowledge that sooner or later it will surely come, rarely moves them to part with their possessions by giving their property away. But

when, by reason of some impending peril, or bodily condition, or the circumstances of the man's situation he has come to believe that death is *near*, and that apprehension or expectation has become so gripping as to cause or move him to part with his estate, and to transfer it without a money consideration, then it is that the transfer may be properly characterized as one made "in contemplation of death."

Whether the phrasing be, expectation or anticipation of death in the "*immediate* future," or in the "*near* future," or in the "*close* future," is not material, since all these phrases convey the same meaning. They alike express the thought that if the moving cause of the transfer was the apprehension that death was at hand; thought to be *so* near that the decedent's concern was as to the disposition he should make of his property, rather than what he should or would do, for himself—the transfer is then to be regarded as having been made "in contemplation of death."

If, in charging the jury, the Court had have preferred to say that if the moving cause of the transfer was the expectation or anticipation of death, either in the immediate future *or* in the "*reasonably close*" future, the transfer should be regarded as one made in contemplation of death, the jury *might* still understand that to mean either death in the *immediate* future (in effect, *then*) or death at *such an early* date in the future as to so grip the decedent as to be *the* moving cause of the transfer. But when the language

of the charge is "in the immediate, or *reasonably distant* future" it is difficult, if not impossible to say what a jury of ordinary, or even extraordinary, men would understand this language to mean. Whatever it may mean, it tends to *minimize* and to *eliminate* the element of *immediateness*, the all-important and determining factor which excites that *apprehension* of death—which is the *moving cause* of the transfer.

As phrased, the charge does not direct the jury to consider whether death (which Mrs. Dickel of course knew *would* come in the future) was believed or apprehended by her to be so near that this apprehension was the moving cause of the transfer; but it rather directs them to consider whether she believed death to be so far *distant* that her expectation or anticipation could not be regarded as the moving cause of this transfer. It seems to proceed upon the idea that if Mrs. Dickel's expectation as to death, was of death in the *distant* future, the jury could hardly be expected to find that such an expectation or apprehension was *the* moving cause of the transfer; also that if her expectation as to death was of death in the "*unreasonably distant*" future, the jury could still hardly be expected to find that *such* an expectation was *the* moving cause of the transfer; but that if her expectation as to death was of death in the "*reasonably distant*" future, the jury *might* find that what is reasonably distant is reasonably close, and what is reasonably close is the same as that which is immediate—

and therefore the transfer was made "in contemplation of death." But is that inference or finding justified?

If, when Mr. Spicer met Mrs. Dickel in April 1915, he had inquired as to her expectation as to life and she had replied, "Mr. Spicer I expect death to come to me in the reasonably distant future," could he have imagined that the thought of death was *the* moving cause of the transfer she was about to make?

Mrs. Dickel was seventy-seven years of age. Her expectation, according to mortality tables, was between five and six years. She probably knew nothing of those tables, and looked upon life as all aged persons who are not troubled by some malady or dangerous disease, always do. As said by the Supreme Court of Wisconsin, they generally entertain the feeling that they have a few years longer to live, no matter how old they are, and do *not* regard death as imminent. (Re. *Dessert*, 154 Wis., 320; 46 L. R. A. (N. S.) (795).)

The Court obviously meant for the jury to understand that a transfer made as the result of that *general* expectation of death which all persons have, should not be considered as having been made "in contemplation of death," and to understand that a transfer made because death was expected in the immediate future, *should* be regarded as having been so made; but it *also* meant for the jury to understand that a transfer should be regarded as having been made "in

contemplation of death" if the moving cause was the apprehension of death either in the immediate future or in the *distant* future, *provided* it was only "reasonably" distant.

The view of the Court of Appeals appears from this extract from its opinion:

"The transfer in question was an absolute gift *inter vivos*, claimed by the government to have been testamentary in character. On principle, and without present reference to authority, the ultimate question concerns the *motive* which actuated the grantor, that is to say, whether or not a *specific* anticipation or expectation of her own death, immediate or near at hand (as distinguished from the general and universal expectation of death some time) was the immediately moving cause of the transfer.

Both the elements of "existing conditions of body," as distinguished from the grantor's mental state on that subject, and the term "impending," are *inconsistent with the prima facie provision of Section 202 b*—which we have set out in paragraph (a) of the first division of this opinion." (*Rec.* 240, 235.)

The paragraph (§202 *b*) referred to by the Court is as follows:

"Any transfer of a *material* part of his property in the nature of a *final* disposition or distribution thereof, made by the decedent within *two years* prior to his death without such a consideration (a fair consideration in money or money's

worth) shall, *unless shown to the contrary*, be deemed to have been made in contemplation of death within the meaning of this title." (*Rec.* 235.)

As will be observed, whenever it appears that there has been a transfer which—

(a). Disposes of a *material* part of the decedent's property, and

,b.) Which was not made for a fair consideration in money or money's worth, and

(c.) Which was *in the nature* of a *final* distribution or disposition of the property, and

(d.) Which was made within the two years next preceding the decedent's death—

such transfer is to be "deemed" as having been made "in contemplation of death" within the meaning of the Act, *unless shown to the contrary*.

The statement that the elements of (a) an "existing condition of body," (b) and an "impending" peril, are *inconsistent* with the *prima facie* provision of Section 202 (b,) which appears in the opinion of the Courts of Appeals, is correct. They *are*, but the significance of that inconsistency appears to have altogether escaped the sagacity of the Court. If the statute had said that when the circumstances, or facts, set out in Section 202 *b* appear, the transfer shall be conclusively presumed to have been made "in contemplation of death" within the meaning of the statute, the *exclusion* from consideration of any and all

other facts "*inconsistent*" with that accepted presumption *would* be proper. *But the statute does not so provide.* The statute is that when these specified things appear or exist, the transfer shall "*be deemed*" to have been made in contemplation of death, "*unless shown to the contrary.*" It permits a showing "*to the contrary*" to be made: permits the *prima facie* presumption to be rebutted. Necessarily evidence of facts or conditions "*inconsistent*" therewith may be given—which obviously *destroys* the logic of the opinion of the Court of Appeals, based (as it is) on the proposition that things *inconsistent* with the "*deem*" are, for that reason alone, not allowed to be proven. The provision "*unless shown to the contrary,*" necessarily *implies* that the possibility of the presence or existence of other facts which may countervail or overcome the presumption, is recognized by the statute itself. And what facts could be more significant than these, namely: (a) that there were no existing bodily conditions, (b) and no impending peril, to cause the transferrer to apprehend that death was "*immediate*" or "*near at hand*"? (Rec. 240.)

The Commissioner of Internal Revenue and the Circuit Court of Appeals appear to have given the word "*only*" its broadest possible meaning, regardless of the context, or the object and purpose of the in contemplation of death clause in this statute. In an official opinion announced by Mr. Commissioner

Osborn, October 21st, 1916, known as "Treasury Decision No. 2385, this appears:

"This language" (i. e. 'has at any time made a transfer,') "is *so specific* that it hardly would seem open to question that Congress intended to include in the gross estate not only such transfers, including gifts and sales not *bona fide* made by instrument dated after September 8th, 1916, or where the actual transfer took place after that date, but transfers of any kind made in contemplation of death *at any time whatsoever prior to September 8, 1916*. It is *believed* also that there is no question of the power of Congress to enact such revenue legislation. The *test* of the tax liability is not in such cases the date of the instrument making the transfer or the date of the actual transfer, but the *date of the death* of the decedent.

Respectfully,

W. H. OSBORN,

Commissioner of Internal Revenue."

And the Circuit Court of Appeals says:

"Section 201 imposes a tax upon the transfer of the net estate of '*every* person dying after the passage of this act.' In Section 202 the taxable estate of the decedent embraces all transfers of the two classes already mentioned which the decedent has '*at any time made*.' The remaining paragraph of Sec. 202, not already set out, declares that '*any transfer* of a material part of his property in the nature of a final disposition or distribution thereof made by the decedent within two

years prior to his death without such a consideration (a fair consideration in money or money's worth) shall, unless shown to the contrary, be *deemed* to have been made in contemplation of death within the meaning of this title.' The italicized words in each of the above quotations indicate, on their face, *an all-embracing intent*, and are thus *prima facie* opposed to a limitation to transfers made after the passage of the act." (*Rec. p. 235.*)

Undeniably the words "every" and "any" do indicate an "*all-embracing intent*," but the *context* and the *aim* of the statute determine whether any word in it shall receive a broad an unrestricted, or a qualified and limited, meaning. Apparently no importance was attached to these rules, and two words were italicized and segregated, and the "all-embracing" intent they indicated in their isolation, imputed to the entire statute.

The error of such a view has been shown herein before. (See page 30 *infra.*)

It is obvious that if the taxing act now under consideration operates prospectively and not retrospectively, no other question need to be considered: also that even if it operate retroactively, if it can do so only for the fiscal or calendar year in which the act was passed, because of the limitation imposed by the due-process clause of the 5th Amendment, no other question needs to be determined. But if these ques-

tions be decided against the appellant's contention, it will then of course become necessary to consider the other particular errors assigned, discussed in the brief of Messrs. Keeney and Amberg.

RESUME

1. The transfer made by Mrs. Dickel was absolute. It took effect when made, reserved no interest to Mrs. Dickel, and vested the title, possession and enjoyment in the grantees the day it was executed. (p. 1.)

2. It was in no respect contingent upon or affected by Mrs. Dickel's *death*. (p. 1.)

3. *Death* itself is the generating source of estate taxation, and of the taxation of transfers made to take effect "in possession or enjoyment" on the death of the transferrer; but the *apprehension* of death is the occasion of the making of transfers "in contemplation of death," and they are for that reason different in nature. (p. 10.)

4. The reason for imposing estate taxes on transfers made "in contemplation of death" is to defeat evasions, and to prevent the use of these transfers as substitutes for transfers made by virtue of *testate*" and intestate laws. (pp. 17, 22.)

5. It is unthinkable that a transfer was made *to* evade an estate tax, or to circumvent a taxing statute, or that the transfer could have that *effect* whether so intended or not, when there was no such tax or tax-

ing statute *existent*, at the time the transfer was made. (p. 46.)

6. "The very essence of the new law is a rule for future cases," and a taxing statute will not be construed to be retroactive unless the words are so strong, clear and imperative that no other meaning can be given them, or unless the *purpose* of the act cannot otherwise be satisfied. (p. 33.)

7. When the words of this estate-tax act, and its *object*, and the *reason* for the presence of the in-contemplation-of-death clause, are considered, it must be denied any retroactive operation. The words "every" and "at any time" as used refer to transfers and time *subsequent* to the passage of the act. (p. 43.)

8. The taxing power of Congress is qualified and limited by the due-process-of-law clause of the 5th Amendment to this extent; it disables the Congress from "arbitrary" taxation. (p. 47.)

9. A taxing statute may operate retroactively for the *expired* portion of the fiscal or calendar year in which it was enacted, but no further, without violating the "due-process" clause of the Constitution of the United States. (p. 14.)

10. If this estate tax act includes absolute completed transfers "in contemplation of death," made more than twelve months before its passage, it is to that extent void as a denial of "due process of law." (p. 47.)

11. The Court below erred—

A. In holding that this estate tax is imposed only on the estate of which a decedent *dies* seized (p. 76); and

B. In holding that the words “in the reasonably *distant* future,” and “in the reasonably close future.” have the same meaning (p. 93), and

C. In holding and charging that the *presumption* of law established by this taxing act is a presumption of fact, and that the instruction to the jury that they should bear it in mind and give it the consideration it deserved was correct (p. 86); and

D. In holding that the words “every” and “at any time” as they appear in the taxing statute are all-embracing, and operate to make it retroactive more than one year (p. 105); and

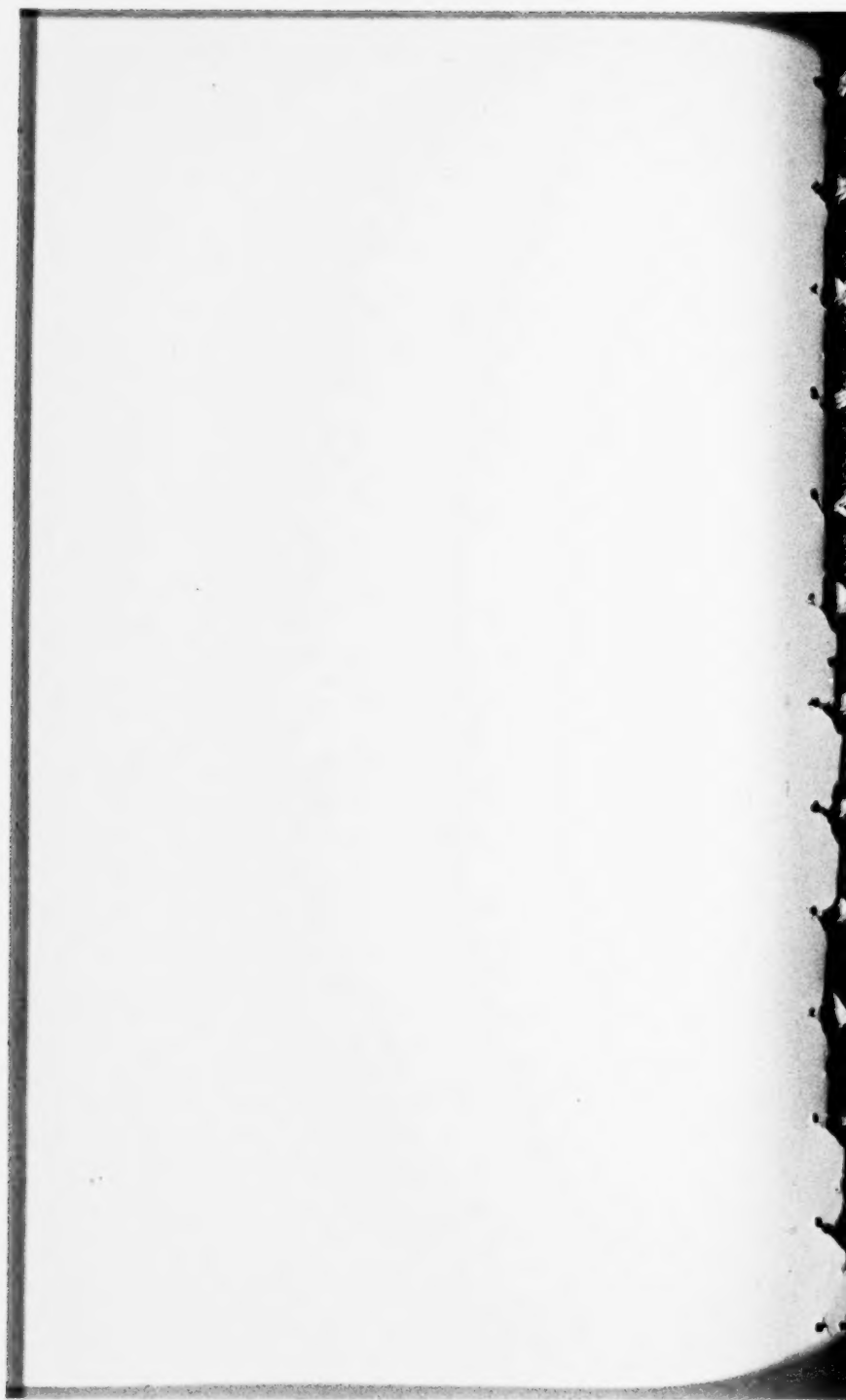
E. In holding that the tax imposed in this case is constitutional and valid.

It is respectfully submitted that the judgment in this case should be reversed.

JOHN J. VERTREES,

WILLIAM O. VERTREES,

Attorneys for Appellant.



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In the Supreme Court of the United States.

OCTOBER TERM, 1921.

VICTOR E. SHWAB, EXECUTOR, ETC.,	}	No. 200.
plaintiff in error,		
<i>v.</i>		
EMANUEL J. DOYLE, U. S. COLLEC-		
tor, etc., defendant in error.		

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This action was brought by plaintiff Shwab, executor of the estate of Mrs. Augusta Dickel, against the defendant, a collector of internal revenue, to recover \$56,548.41, which plaintiff had paid as an estate tax under protest. The tax was assessed and exacted under Sections 200-212 of the Act of September 8, 1916 (39 Stat. Ch. 463, pp. 777-780), which appear under the title "Estate Tax," and which require in measuring the tax that there shall be included any interest in the estate "of which the decedent has at any time made a transfer, or with reference to which he has created a trust, in contemplation of * * * his death." On the trial in the district court the only question submitted to the jury was

whether the trust in question had been created in contemplation of death. The jury answered this question in favor of the defendant. A motion for a new trial was made and overruled, and judgment was pronounced in favor of the defendant. The case was then removed to the United States Circuit Court of Appeals, where the judgment of the District Court was affirmed, and it was brought to this court by writ of certiorari.

The deed by which the trust in question was created bears date of April 21, 1915, and was delivered to and accepted by the trust company on or before June 3, 1915 (R. 179, 186). By that instrument Mrs. Dickel conveyed to the Detroit Trust Company securities having a face value of \$1,000,000, and an estimated value at the time of her death of \$975,000 (R. 5, 180, 182). The trust was created for the benefit of Victor E. Shwab, the husband of Mrs. Dickel's sister, and six of his children and their distributees, and was to continue during the life of said Shwab and of all of his said children, and the net proceeds were to be paid to Mr. Shwab during his life, and thereafter to his said children, and upon the death of either of them, to those entitled under the terms of the instrument. Mrs. Dickel reserved no power of revocation or of control over the estate (R. 179-186). She died on September 16, 1916 (R. 84), leaving a net estate, excluding this trust estate, of \$804,842.24 (R. 3).

The trial court held that the statute imposed the tax upon the transfer of the estate owned by the dece-

dent at the time of her death, but required that all properties previously transferred, or in which a trust had been created in contemplation of death, be included in measuring the gross estate (R. 161). The court of appeals expressed the view that the tax applies —

to all transfers in contemplation of death, whether made before or after the passage of the Act, provided the transferer's death occur after the Act took effect (R. 235).

For convenient reference in reading this brief those parts of the statute which may be regarded as material are here reproduced.

SEC. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States.
* * *

SEC. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.

(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; and

(c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent. (Pp. 777, 778.)

SEC. 203. That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not

compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; and

(2) An exemption of \$50,000 * * * (P. 778.)

SEC. 208. * * * If the tax or any part thereof is paid by, or collected out of, that part of the estate passing to, or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

SEC. 209. That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien.

If the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth) and if the tax in respect thereto is not paid when due, the transferee or trustee shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for a fair consideration in money or money's worth shall be divested of the lien, and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for a fair consideration in money or money's worth. (Pp. 779, 780.)

ARGUMENT.

Plaintiff insists that the statute was improperly construed by both the District Court and the Court of Appeals to apply to the facts of this case, and that if it must be so construed it is unconstitutional. In discussing these two questions, in order to avoid repetition in a separate brief, the argument will take a range sufficiently broad to apply to the companion cases heard along with this one.

I.

THE PROVISION OF THE ACT REQUIRING THAT ANY INTEREST IN WHICH THE DECEDENT MAY HAVE CREATED A TRUST IN CONTEMPLATION OF, OR INTENDED TO TAKE EFFECT IN POSSESSION OR ENJOYMENT AT OR AFTER HIS DEATH, SHALL BE INCLUDED IN ESTIMATING THE VALUE OF THE GROSS ESTATE, IS CONSTITUTIONAL, THOUGH CONSTRUED TO INCLUDE THE TRUST ESTATE HERE IN QUESTION.

The constitutional questions will be first considered, because it is insisted that the supposed unconstitutionality of the act should have a bearing on its construction.

In *New York Trust Co. v. Eisner*, 256 U. S. 348, this act was assailed as "an unconstitutional interference with the rights of the States to regulate descent and distribution, as unequal and as a direct tax not apportioned as the Constitution required." All these objections were overruled, the court manifestly not regarding either of them as at all serious. The grounds of attack here are somewhat shifted to enable counsel to draw a distinction between their contentions here and the points decided in that case.

The contentions here are, that, if the statute applies at all to a *transfer made or trust created prior to the passage of the act*, it is unconstitutional, because—

(1) It would deprive the transferee of his property without due process of law, in violation of the Fifth Amendment;

(2) If the Fifth Amendment does not apply, it would violate a limitation upon the taxing power of Congress, which is not found in the written Consti-

tution, but arises out of the essential nature of all free governments;

(3) It would undertake to impose a direct tax, and would be void for the want of uniformity.

These propositions will be considered in the order stated:

- (1) **The power of Congress to lay and collect taxes, duties, imposts, and excises is granted by and finds its sole limitation in Article I, Section 8, paragraph 1, of the Constitution; and the Fifth Amendment imposes no limitation upon that power.**

This proposition has been so conclusively settled by this court that extensive comment would be improper.

The principal cases wherein the question has been considered and the proposition sustained are:

License Tax Cases, 5 Wall. 462, 471;

United States v. Singer, 15 Wall. 111, 121;

Knowlton v. Moore, 178 U. S. 41, 57, 58;

Patton v. Brady, 184 U. S. 608, 619, 620, 622;

McCray v. United States, 195 U. S. 27, 59, 60, 63;

Flint v. Stone Tracy Co., 220 U. S. 107, 158;

Billings v. United States, 232 U. S. 261, 281, 282;

Brushaber v. Union Pac. R. R. Co., 204 U. S. 1, 20, 24;

United States v. Doremus, 249 U. S. 86, 93;

Because they are the latest cases upon the subject, we call special attention to the last two cases cited.

In *Brushaber v. Union Pacific R. R. Co.*, the validity of the income tax law passed pursuant to the Sixteenth

Amendment (38 Stat. p. 166) was questioned; and as to the contention that the Fifth Amendment limited the power of Congress to impose taxes, the court said:

So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause (p. 24).

United States v. Doremus, involved the validity of the act regulating the sale and distribution of narcotics, known as the Harrison Act (38 Stat. Ch. 1, sec. 1, p. 785). The only revenue obtained under the act was a special tax of one dollar per annum paid by each person who was required to register. It was earnestly insisted that, while it appeared under the guise of a revenue act, yet it was in fact but a police regulation, and was an encroachment upon the powers reserved to the States. This was an angle of attack different from the usual one, but the validity of the act was sustained, the court saying:

The only limitation upon the power of Congress to levy excise taxes of the character now under consideration is geographical uniformity throughout the United States. This court has often declared it cannot add others. Subject to such limitation Congress may select

the subjects of taxation, and may exercise the power conferred at its discretion. *License Tax Cases*, 5 Wall. 462, 471. Of course Congress may not in the exercise of federal power exert authority wholly reserved to the States. Many decisions of this court have so declared. And from an early day the court has held that the fact that other motives may impel the exercise of federal taxing power does not authorize the courts to inquire into that subject. If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it. *Veazie Bank v. Fenno*, 8 Wall. 533, 541, in which case this court sustained a tax on a state bank issue of circulating notes. *McCray v. United States*, 195 U. S. 27, where the power was thoroughly considered, and an act levying a special tax upon oleomargarine artificially colored was sustained. And see *Flint v. Stone Tracy Co.*, 220, U. S. 107, 147, 153, 156, and cases cited (p. 93.)

Authorities cited and relied on by plaintiff.

Some authorities are cited in plaintiff's brief which it is claimed sustain the proposition that the Fifth Amendment does limit the taxing power of Congress, but a consideration of those authorities will show that they have no application to this precise question. The following is quoted from *Cooley on Constitutional Limitations*, 7th Ed. p. 680:

These are express limitations, imposed by the Constitution upon the federal power to tax; but there are some others which are implied, (a) and which under the complex system of American government have the effect to exempt some subjects otherwise taxable from the scope and reach, according to circumstances, of either the federal power to tax or the power of the several States.

But a reading of the entire context shows that the sole limitation of the Federal power to tax which the author had in mind was, that Congress cannot tax the agencies of state governments, which prohibition arises by the same implication that prohibits the States from taxing the means by which the National government performs its functions, and is the result, as the author expresses it, of "the complex system of American government." Also the following quotation is taken from the same author:

Having thus indicated the extent of the taxing power, it is necessary to add that certain elements are essential in all taxation, and that it will not follow as of course, because the power is so vast, that everything which may be done under pretence of its exercise will leave the citizen without redress, even though there be no conflict with express constitutional inhibitions. Everything that may be done under the name of taxation is not necessarily a tax; and it may happen that an oppressive burden imposed by the government, when it comes to be carefully scrutinized, will prove, instead of a tax, to be an unlawful confiscation of property, unwarranted by any

principle of constitutional government (page 695).

This language clearly shows that the author had in mind, not the power to impose taxes, but the power to exact taxes to be contributed to an object outside of legislative power; and this is further shown by reading the context which follows the passage quoted.

Loan Association v. Topeka, 20 Wall, 655, is an illustration of such a case. There this court held that the State of Kansas could not authorize a town to impose a tax to raise money to be contributed to private enterprises.

The concurring opinion of Mr. Justice Bradley in *Davidson v. New Orleans*, 96 U. S. 97, is also cited; but the court was there considering whether or not a statute of the State of Louisiana violated the Fourteenth Amendment. So *Dent v. West Virginia*, 129 U. S. 114, involved the constitutionality of a West Virginia statute limiting the practice of medicine, and the question arose under the Fourteenth Amendment; and the insistence in *Giozza v. Tiernon*, 148 U. S. 657, was that a Texas statute taxing persons engaged in the sale of liquor was violative of the Fourteenth Amendment.

Plaintiff also relies upon *State v. Probate Court*, 102 Minn. 268. That case involved a complicated series of transactions whereby before the enactment of the inheritance tax law certain properties had become fully vested in the wife and children of the deceased. The main question discussed was whether or not the transaction was such as to show that it was made in good faith and actually vested the estate in the wife

and children. The court found that it was a good-faith transaction, and held that the tax could not be exacted, though the donor died after the enactment of the statute. The constitutionality of the statute was not discussed, but apparently it was considered that if it affected vested rights, it would violate Article I, Section 10 of the Constitution of the United States, which prohibits a State from passing any law impairing the obligation of contracts, and also a similar provision in the constitution of the State of Minnesota. In *Hunt v. Wicht*, 174 Calif. 205, it was held that a deed in form an absolute unconditional conveyance of the property described which was delivered by the grantor to a third person in escrow to be delivered to the grantee on the death of the grantor, with the intention on his part of making the delivery absolute and placing it beyond his power to revoke or control, passed the present title to the grantee, and that the legislature was without power to subsequently impose a succession tax upon such fully executed transfer of title, and it was immaterial that the transfer was made in contemplation of the grantor's death and without a valid consideration. But the ground of this decision was that—

to impose a tax based on the succession would be to diminish the value of the vested estate, to impair the obligation of a contract, and take private property for public use without compensation—

and would therefore violate Article I, Section 10 and the Fourteenth Amendment of the Constitu-

tion of the United States, and doubtless also a similar provision in the constitution of California. The *Matter of Cregg*, 89 N. Y. Supp. 971, and affirmed on opinion below in 181 N. Y. 551, was a similar case, and the decision was based upon the same constitutional provisions.

In fact, no case involving the validity of a state statute of this character has any bearing upon the constitutional question here presented, because the power of the legislatures of the several States is limited by Article I, Section 10 and the Fourteenth Amendment of the Constitution of the United States, and by provisions in the state constitutions themselves; while congressional power to impose taxes has no limitations of such character.

The several authorities cited wherein property was defined, and it was held that vested rights could not be abrogated involved other matters than the power of Congress to impose taxes, and need no consideration.

(2) There is no such thing as a limitation upon the power of Congress to lay taxes arising out of the essential nature of free government.

In support of this contention counsel quotes the following from the concurring opinion of Mr. Justice Field in *Pollock v. Farmers' Loan & Trust Company*, 157 U. S. 599:

As stated by counsel: "There is no such thing in the theory of our national government as unlimited power of taxation in Congress. There are limitations," as he justly

observes, "of its powers arising out of the essential nature of all free governments; there are reservations of individual rights, without which society could not exist, and which are respected by every government. The right of taxation is subject to these limitations.

The counsel referred to by Mr. Justice Field relied as authority for the proposition quoted upon the language used by Mr. Justice Miller in delivering the opinion of the court in *Loan Association v. Topeka*, 20 Wall. 663, as follows:

There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B who were husband and wife to each other should be so no longer, but that A should thereafter be the husband of C, and B the wife of D. Or which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B.

It might be remarked that there is no pretense that Congress possesses any power to do the things here suggested by the learned Justice; but immediately following the foregoing language the court said:

Of all the powers conferred upon government that of taxation is most liable to abuse. Given a purpose or object for which taxation

may be lawfully used and the extent of its exercise is in its very nature unlimited. It is true that express limitation on the amount of tax to be levied or the things to be taxed may be imposed by constitution or statute, but in most instances for which taxes are levied, as the support of government, the prosecution of war, the National defense, any limitation is unsafe. The entire resources of the people should in some instances be at the disposal of the government.

The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people (p. 663).

No opinion of this court or of any other court is cited which undertakes to define any such power as is here suggested, or to state positively that it exists. And these expressions have arisen out of the vague fear that some legislation might at some time be enacted of such character that it would shock all sense of justice and right to permit its enforcement.

We respectfully submit that such a contention has no just foundation in fact when applied to the Government of the United States, and finds no warrant in any decision of this court. What is the essential nature of this Government, which has always been classified as a free government? From the adoption of the Constitution to the present day it has been uniformly held that all the powers which can be exercised by its several branches must be found within the four quarters of that instrument. The entire

nature of the Government is contained in the Constitution, and there is nothing inherent or essential in its nature which is not expressed therein. All individual rights other than those expressly or by implication granted by the Constitution were reserved, but nothing was reserved which was so granted. The power of Congress to impose taxes is precisely as expressed in that instrument. To say that any other limitation exists is more unreasonable than to say that such power, while expressly vested by the taxing clauses, yet is taken away or diminished by the due process clause of the Fifth Amendment, which insistence, as above shown, this court has repeatedly repudiated.

How far, if at all, the general principle stated by Mr. Justice Field is applicable to state governments whose constitutions are construed by different principles, it is not necessary here to consider.

There is certainly nothing in this act when construed to apply to transfers made and trusts created before its passage in contemplation of the death, or to take effect in possession and enjoyment at or after the death, of the transferrer after its passage, which renders it so peculiarly unjust and arbitrary as to require the overthrow of a principle of constitutional law which has been so repeatedly and well recognized by this court ever since the Fifth Amendment was adopted.

Two grounds of complaint are suggested, which we will briefly consider:

(a) *That it imposes a tax on a past transaction and affects vested rights.*

Without now discussing whether the tax is in fact laid upon a past transaction, with what peculiar and extraordinary hardship is plaintiff burdened if it were? The statute requires the payment of the tax, first, if the owner of the property dies intestate; second, if he devises it by will; third, if he conveys it by instrument by the terms of which the donee is to enter into the possession or enjoyment of the property on or after the death of the donor; and, fourth, if the donor in contemplation of death conveys it absolutely to the donee or in trust for his immediate use and benefit. If Mrs. Dickel had not undertaken to dispose of this property in any way, it is not disputed that the tax would have to be paid. A like concession is made if she had disposed of it by will. Nor is it specially questioned in this case that if she had executed a transfer, or created a trust, providing that she should receive the proceeds during her life, and that upon her death Victor E. Shwab should enter into the possession or enjoyment of the estate, the assessment would be legal. But in either of those events Mrs. Dickel would have received the proceeds of the property during her life. *The only practical difference, therefore, is that Mr. Victor E. Shwab received the proceeds of the estate from the time that the instrument was delivered until the death of Mrs. Dickel, when otherwise Mrs. Dickel would have received them. Now does any injustice to, or any hardship upon, the executor or the devisees under Mrs. Dickel's will arise out of the fact that Mr. Shwab received the proceeds of this million dollar estate, rather than that*

were they paid over to Mrs. Dickel? What serious ground of complaint does that afford the executor or the devisees? Suppose Mrs. Dickel in her will had devised her remaining property to Victor E. Shwab for life, with the remainder to his children, which would have been a disposition quite similar to that made by the trust agreement, Mr. Shwab would then be complaining that it is unjust to make him pay the taxes because he had for a year and a quarter been enjoying the proceeds of Mrs. Dickel's million dollar estate instead of its being paid to her. It is perfectly apparent that there is no just ground for complaint because of any injustice or hardship growing out of applying the law to this transaction.

This is equally true as to a transfer made or trust created to take effect in possession or enjoyment at or after the death of the transferor. How can the taker of such an estate or the transferor be in any worse condition than if it had passed by will? Counsel have expended much labor in imagining peculiar circumstances under which great hardship might result from the construction insisted upon by defendant. In the brief filed by plaintiff in *Union Trust Co. v. Wardell*, pages 10 and 11, instances are given where there has been enormous increases in the valuation of tracts of land, one tract of 640 acres increasing from \$3,200 in 1918 to \$11,518,855 in 1921; but so far as the records before the court show no estate tax has yet been paid on any of those properties. In other words, all of the illustrations are purely imaginary. And by a similar exercise of the

imagination it can be shown that the statute might work equally great hardship if construed to apply only to transfers made after its passage. For illustration take the tract of land above mentioned. It increased in value from \$3,520 in 1919 to \$960,000 in 1920. The probabilities are that oil was struck upon it, and the entire increase was within a month, or possibly a week's time. Suppose when this property was worth \$3,520 the owner having six children and an estate worth \$20,000 had created after the passage of this act an irrevocable trust in it, the rentals therefrom to be paid him during his life, with remainder to one of the children as such child's part of his estate, and he had died after the value increased to \$960,000. As the tax is primarily chargeable against the estate which remains undisposed of, the other children's interest would have been entirely wiped out. The same inequality might result from disposition of property by will, if after its execution the testator should become permanently incapacitated to revoke the will. No tax law of this character can be so framed as to guard against inequality and hardship under every conceivable condition. But in practice it is exceedingly infrequent that a serious inequality or hardship actually arises. It may be regarded as a hardship to pay any taxes at any time, but certainly none here results from the fact that Mrs. Dickel chose the method of creating a trust in contemplation of death to dispose of this estate, rather than either of the methods above mentioned.

(b) *That it was unjust and arbitrary to classify trusts created, or transfers made, in contemplation of death before the passage of the act with transfers of estates by the other methods described in the act.*

That the classification here made is entirely proper, and moreover that it is within the discretion of Congress to choose the objects of taxation is shown by the following and many other decisions of this court:

In *Magoun v. Illinois Trust and Savings Bank*, 170 U. S. 283, 296, one ground upon which it was insisted that the inheritance tax law of Illinois was in conflict with the Fourteenth Amendment, was because it contained an improper classification for taxation. Upon that subject the court said:

There are three main classes in the Illinois statute, the first and second being based, respectively, on lineal and collateral relationship to the testator or intestate, and the third being composed of strangers to his blood and distant relatives. The latter is again divided into four subclasses dependent upon the amount of the estate received. The first two classes, therefore, depend on substantial differences, differences which may distinguish them from each other and them or either of them from the other class—differences, therefore, which “bear a just and proper relation to the attempted classification”—the rule expressed in the *Gulf, Colorado & Santa Fe Railway v. Ellis*, 165 U. S. 150. And if the constituents of each class are affected alike, the rule of equality prescribed by the cases is satisfied. In other words, the law operates “equally

and uniformly upon all persons in similar circumstances" (p. 296).

If such a classification was valid under the Fourteenth Amendment, certainly the classification here complained of cannot render invalid this provision of the act when Congress is not limited in its power to classify subjects for taxation.

In *Flint v. Stone Tracy Company*, 220 U. S. 107, 145, 158, 169, the court said:

In levying excise taxes the most ample authority has been recognized from the beginning to select some and omit other possible subjects of taxation, to select one calling and omit another, to tax one class of property and to forbear to tax another (p. 158).

And again:

The argument, at last, comes to this: That because of possible results, a power lawfully exercised may work disastrously, therefore the courts must interfere to prevent its exercise, because of the consequences feared. No such authority has ever been invested in any court. The remedy for such wrongs, if such in fact exist, is in the ability of the people to choose their own representatives, and not in the exertion of unwarranted powers by courts of justice (p. 169).

Keeney v. New York, 222 U. S. 525, 536, involved the validity of a statute passed by the State of New York containing almost the exact language of the statute here in question. Of course, it was insisted that it violated the Fourteenth Amendment, and the classifica-

tion was therefore a material matter for consideration, but upon this subject this court said:

There can be no arbitrary and unreasonable discrimination. But when there is a difference it need not be great or conspicuous in order to warrant classification. In the present instance, and so far as the Fourteenth Amendment is concerned, the State could put transfers intended to take effect at the death of the grantor in a class with transfers by descent, will or gifts in contemplation of the death of the donor, without, at the same time, taxing transfers intended to take effect on the death of some person other than the grantor, or on the happening of a certain or contingent event (p. 536).

In *Billings v. United States*, 232 U. S. 261, 281, with reference to the inequality of a tax upon foreign-built yachts, the court said:

The contention that inequality must be the result from making the tax depend upon mere use without reference to the extent of its duration, addresses itself not to the question of power, and is therefore beyond the scope of judicial cognizance (p. 281).

(3) The tax laid is an excise and not a direct tax.

Upon this subject in *New York Trust Company v. Eisner*, 256 U. S. 349, the court said:

After the elaborate discussion that the subject received in that case [*Knowlton v. Moore*] we think it unnecessary to dwell upon matters that in principle were disposed of there. The same may be said of the argu-

ment that the tax is direct and therefore is void for want of apportionment. It is argued that when the tax is on the privilege of receiving, the tax is indirect because it may be avoided, whereas here the tax is inevitable and therefore direct. But that matter also is disposed of by *Knowlton v. Moore*, not by an attempt to make some scientific distinction, which would be at least difficult, but on an interpretation of language by its traditional use—on the practical and historical ground that this kind of tax always has been regarded as the antithesis of a direct tax; “has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy.” (178 U. S. 81–83.) Upon this point a page of history is worth a volume of logic.

But the distinction is sought to be made that there the court was considering the statute as prospective, while here the contention is that the tax is laid upon the transfer, and that to tax a past action or event is not the taxing of a privilege because it has already been exercised, but is a direct tax upon the estate from which it is to be paid.

Plaintiffs in the several cases are very insistent that the tax must be attached to the technical transfer of the property, which is supposed to take place at a particular moment of time. It is important therefore to consider the exact nature of this tax.

After a very exhaustive and learned review of tax legislation of this character this court in *Knowlton v. Moore*, 178 U. S. 41, 47, 57, said:

Taxes of this general character are universally deemed to relate not to property *eo nomine* but to its passage by will or by descent in cases of intestacy, as distinguished from taxes imposed on property, real or personal as such, because of its ownership and possession. In other words, the public contribution which death duties exact is predicated on the passing of property as the result of death, as distinct from a tax on property disassociated from its transmission or receipt by will, or as the result of intestacy.

And again upon the same subject:

Confusion of thought may arise unless it be always remembered that, fundamentally considered, it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties. The qualification of such taxes as privilege taxes, or describing them as levied on a privilege, may also produce misconception, unless the import of these words be accurately understood.

That act laid taxes only upon property passing by will or inheritance. But that the court is not greatly concerned about a technical definition of the tax appears from the following language in *Cahen v. Brewster*, 203 U. S. 550:

For definitions of an inheritance tax plaintiffs in error adduce *United States v. Perkins*, 163 U. S. 625; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283; *Knowlton v. Moore*, 178 U. S. 41. The tax was defined in the *Perkins* case to be "not a tax upon the property itself, but upon

its transmission by will or descent"; and in the *Magoun* case, "not one on property but one on the succession." In *Knowlton v. Moore* it was said that such taxes "rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit or the transmission from the dead to the living, on which such taxes are more immediately rested." But these definitions were intended only to distinguish the tax from one on property, and it was not intended to be decided that the tax must attach at the instant of the death of a testator or intestate. In other words, we defined the nature of the tax; we did not prescribe the time of its imposition.

Therefore it is not necessary to hunt out any particular moment when it may be said the tax attaches. What is really taxed is the passing of the property *because of the death of its owner, whether his death follows, is coincident with or precedes the consummation of its passing.* And the death of the owner must always be kept in mind, *because the tax can not attach until the happening of that event.* If the owner die intestate the title to the real estate passes instantly to the heirs; but not so the personality. It will most likely be converted into cash and distributed in that form. The same may be said when the estate passes by will. When a transfer is made, or trust created, to take effect in possession or enjoyment at or after the death of the donor, the passing of the property extends from the execution of the transfer or trust to the taking of possession by the transferee.

While the right to the property may become irrevocably vested when the instrument creating the trust or the remainder estate is delivered, yet that which makes property really valuable, its possession and use, has not passed. The word "transfer" as used in the statute certainly includes the passing of both the title and the possession. A transfer made or trust created in contemplation of death may pass both the title and the possession at once, or one or both may hang in suspense for an indefinite length of time. In fact that is the precise condition in the present case. Both the legal title and the possession of the estate are in the Trust Company; *and there will not be a complete devolution of the title till the trust shall be terminated.* When the title and possession both pass upon the delivery of the instrument still the *occasion* for the tax is not complete, and will not be until the death of the donor. Both the transfer *and the death* are prerequisites of the tax. Hence in a sense under such circumstances the tax is always retroactive, in that when called into being by the death of the donor it reaches back to the transfer. But it is the *occasion* composed of the two elements, the transfer *in contemplation of death* and the death, that are taxable.

A review of some of the cases in which retroactive excise tax statutes have been sustained will be helpful upon both this question and the construction of the statute, which will be hereafter considered.

Stockdale v. The Insurance Companies, 20 Wall. 323, 331, 332, involved the validity of tax on in-

comes which was then regarded as an excise tax. By the act of June 30, 1864 (13 Stat. 281; 14 Id. ch. 159, sec. 14, p. 480), it was provided that the taxes on incomes should be levied on the first day of March, and be due and payable on or before the thirtieth day of April of each year until and including the year 1870, and no longer. By another section the tax for any one year was levied upon the income for the preceding year, and hence no tax was leviable under that statute upon an income after December 31, 1869. On July 14, 1870 (16 Stat. ch. 255, sec. 6, p. 257), an act was passed which declared that certain sections of the act

shall be construed to impose the taxes therein mentioned to the first day of August, 1870, but after that date no further taxes shall be levied or assessed under said sections.

It was agreed that the taxes complained of were assessed upon dividends declared by the insurance companies on the earnings which had accrued to the company between the 5th day of July, 1869, and the 30th day of June, 1870, and that the dividend upon which the tax was assessed was declared after the latter date. As under the Act of 1864 the taxation of the income ceased at the close of the year 1869, and the Act of August 1, 1870, had the effect of recreating it as of January 1, it was retroactive from that date up to the date of its passage. The court, however, held that the assessment was valid, saying:

The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year,

cannot be doubted; much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed. The joint resolution of July 4th, 1864, imposed a tax of five per cent. upon all income of the previous year, although one tax on it had already been paid, and no one doubted the validity of the tax or attempted to resist it.

Both in principle and authority it may be taken to be established, that a legislative body may by statute declare the construction of previous statutes so as to bind the courts in reference to all transactions occurring after the passage of the law, and may in many cases thus furnish the rule to govern the courts in transactions which are past, provided no constitutional right of the party concerned is violated (p. 331).

And further:

* * * where it can exercise a power by passing a new statute, which may be retroactive in its effect, the form of words which it uses to put this power in operation cannot be material, if the purpose is clear, and that purpose is within the power. *Congress could have passed a law to reimpose this tax retrospectively, to revive the sections under consideration if they had expired, to re-enact the law by a simple reference to the sections* (p. 332).

Cahen v. Brewster, 203 U. S. 543, 549, involved an application of the inheritance tax law passed by the Legislature of Louisiana on June 28, 1904. Levy, upon whose estate the tax was assessed, died May 26,

1904. The will was probated May 30, 1904, and an inventory of his estate was filed June 9, 1904, nineteen days before the act was passed. A supplementary inventory was filed August 31, after the act was passed; and on the same day the final accounting was filed and judgment entered ordering a distribution of the funds on August 16. The law provided that the tax was—

to be collected on all successions not finally closed and administered upon, and all successions hereafter opened.

The right to the property of course became vested upon the death of the testator, yet the court held that a State may exercise its power to impose an inheritance tax at any time while it holds the property from a legatee, and that the tax was not a deprivation of property without due process of law within the meaning of the Fourteenth Amendment as to the legatees of a decedent dying prior to its enactment but whose estates remained undistributed.

As this case arose under a State statute, the validity of which was determined under the provisions of the Fourteenth Amendment, it is especially significant, because it shows that this court does not regard the vesting of a right to property as prohibiting, even under that amendment, the imposition of a tax thereon where anything remains to be done before its possession by the owner is complete.

Billings v. United States, 232 U. S. 261, involved the construction of section 37 of the Tariff Act of

August 5, 1909 (36 Stat. 112), laying a tax on foreign-built yachts. The act went into effect on August 6, 1909, and provided that the tax should be collected annually on the first day of September. It was insisted that it could not apply to the twelve months preceding the first day of September, 1909, as it would act retroactively for nearly an entire year. However, the court held that Congress possessed the power to impose such retroactive tax, and that the statute should be so construed. The fact that the use of the yacht for the period preceding the passage of the act had already been exercised was not supposed to have changed the tax for that period into a direct tax.

Brushaber v. Union Pacific R. R. Co., 240 U. S. 20, was an action in which the constitutionality of the income tax law passed pursuant to the Sixteenth Amendment was questioned. As to the retroactive provision of the statute, the court said:

The statute was enacted October 3, 1913, and provided for a general yearly income tax from December to December of each year. Exceptionally, however, it fixed a first period embracing only the time from March 1 to December 31, 1913, and this limited retroactivity is assailed as repugnant to the due process clause of the Fifth Amendment and as inconsistent with the Sixteenth Amendment itself. But the date of the retroactivity did not extend beyond the time when the Amendment was operative, and there can be no dispute that there was power by virtue of the

Amendment during that period to levy the tax, without apportionment. * * *

This same principle has been applied in the "power of appointment" cases. In *Orr v. Gilman*, 183 U. S. 278, 281, 282, the facts were that David Dows, senior, died March 30, 1890, leaving a will conveying a life estate to his son David Dows, junior, and further providing that upon his death the property should vest in the children surviving him and the issue of his deceased children as he should by his last will and testament designate and appoint. David Dows, junior, died January 13, 1899, leaving a will in which he exercised the power of appointment and apportioned the property among his three sons. The act under which the tax was imposed was passed April 16, 1897, and contained the following provision:

Whenever any person, or corporation, shall exercise a power of appointment, derived from any disposition of property, made either before or after the passage of this act, *such appointment*, when made, shall be deemed a transfer, taxable, under the provisions of this act, in the same manner as though the property, to which such appointment relates, belonged absolutely to the donee of such power, and had been bequeathed, or devised, by such donee by will. * * *

It was claimed that under the law of New York existing when David Dows, senior, died he had a legal right to transfer by will his property to his grandchildren: that they acquired vested rights in

the property so transferred; and that the subsequent law operated to diminish and impair those vested rights. The Court of Appeals of New York held that the law was valid because, as it said—

Whatever be the technical source of title of a grantee under a power of appointment, it can not be denied that, in reality and substance, it is the execution of the power that gives the grantee the property passing under it.

This court affirmed the Court of Appeals of New York largely upon the authority of *Carpenter v. Pennsylvania*, 17 How. 456, which had held a Pennsylvania statute of a similar character valid.

In *Chanler v. Kelsey*, 205 U. S. 466, 473, 479, the facts were that William B. Astor executed a deed in the nature of a marriage settlement upon his daughter when she married in 1844, by which he conveyed certain real and personal property to trustees to pay the income therefrom to the daughter for life with the remainder to her issue in fee, or, in default of issue, to her heirs, and gave her power in her discretion to apportion the remainder amongst her issue or heirs as she might appoint by an instrument in its nature testamentary. Subsequently other property was conveyed to the trustees in like manner. Those deeds were absolutely irrevocable, took effect upon delivery, and were not made in contemplation of the death of the grantor.

The daughter died in 1902, having exercised in the meantime her power of appointment in favor of the plaintiffs in error. As in *Orr v. Gilman*, it was in-

sisted that the estate had become absolutely vested in the appellants by the power of appointment. But this court said:

However technically correct it may be to say that the estate came from the donor and not from the donee of the power, it is self-evident that it was only upon the exercise of the power that the estate in the plaintiffs in error became complete (pp. 473-474).

Special attention is called to the wording of the statute construed in those cases in that it declares that "*such appointment*, when made, shall be deemed a transfer, taxable," etc. That is, it was the appointment made by Astor in 1844, fifty-three years before the enactment of the statute that, according to the exact language of the act, was taxed as a transfer; but the court apparently treated the tax as imposed upon the entire transaction which terminated when the title and possession became fully vested in the grandchildren.

It is said in explanation of those cases that the tax was upheld solely upon the ground that the beneficiaries had no vested estate and no right of possession or enjoyment until the exercise of the power of appointment after the law took effect. However prior to that time it was a well established rule of property in New York that the rights of those taking through the appointment were derived from the *appointment* and not from the *exercise* of the appointment. *In re Stewart*, 131 N. Y. 274, 281; *In re Harbeck*, 161 N. Y. 211. Therefore, the act of 1897

passed by the Legislature of New York actually had the effect of creating a retroactive rule of property for the purpose of taxation.

There can be no material distinction between the taxes sustained in the foregoing cases and the tax involved in this case. If Congress has the power to tax the use of a yacht which was had before the passage of the act creating the tax, it certainly has the power to tax a transfer made prior to the enactment of the law providing for such tax. In fact, counsel for plaintiff admits that Congress has the power to enact a retroactive law laying an excise tax on transfers, provided it does not apply to transactions had prior to the current fiscal year, or provided the succession is still open. This admission in effect concedes the whole question. If plaintiff's contention can be sustained at all it is because either Congress has not the power by taxation to affect or diminish a vested right, or the incident or privilege taxed having passed the tax is direct and not uniformly apportioned; and if a right is vested, what difference can it make whether the succession is closed or not; and as the Constitution says nothing about a limitation of time, how can it be valid for Congress to tax a transaction by which interests became vested one month before the passage of the act, and yet be invalid if it became vested two months before its enactment, because it happened that the fiscal year began between one and two months previous to the enactment of the law?

II.

THE STATUTE BY ITS PLAIN AND UNAMBIGUOUS TERMS REQUIRED THE ESTATE OF MRS. DICKEL WITH RESPECT TO WHICH SHE CREATED THE TRUST IN CONTEMPLATION OF DEATH (AS FOUND BY THE JURY) TO BE INCLUDED IN ESTIMATING THE VALUE OF HER GROSS ESTATE.

With all constitutional questions out of the way, there can be no difficulty in construing this statute. In fact, its language is so plain that it is not subject to construction; as to exclude this trust estate would require the insertion of words not in the statute, which would be an alteration and not a construction of it. Sometimes the courts will go far toward rewriting a statute to save its validity, but not so if it is undoubtedly valid when given the meaning clearly indicated by its language. The presumption is that the legislative body uses words and phrases in their ordinary meaning, and that presumption is conclusive unless the contrary intent clearly appears from the entire context, or from conditions and circumstances existing at the time, and with reference to which the act was passed.

There is certainly nothing in this act itself that warrants the contention that this trust estate created by Mrs. Dickel should not be included. By Section 201 it is provided:

That a tax * * * equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of *every decedent dying after the passage of this Act.*

The one circumstance essential to create the tax is the death *after the passage of the Act* of the party to whom the estate belonged. Every other fact and circumstance, whether occurring before or to occur after that event, is tied to it. The closing of the transaction at any particular time is not determinative of the tax or of any part of it, but both the right to tax and the measurement of the tax depend upon the death of the donor.

Section 202 specifies exactly what estate shall be included in the measurement of the tax. It requires that the gross estate—

shall be determined by including the value at the time of his death of *all* property, real or personal, tangible or intangible, *wherever situated*:

* * * * *

(b) To the extent of any interest therein of which the decedent has *at any time* made a transfer, or with respect of which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth.

The hypercritical argument is made that the phrase "at any time" does not apply to the creation of a trust, because it splits the verb "has made" and is not repeated to split the verb "has created." If the phrase "at any time" had preceded the first "has," the grammar would have been beyond criticism; but this court has often had occasion to observe that legislation is not always couched in language

grammatically perfect. In fact, it was not necessary to mention the creation of a trust at all, because such a transaction certainly would have been included in the more general term "has made a transfer," but trusts were specifically mentioned that there might be no cavil about their inclusion. If the phrase "at any time" were entirely omitted, the meaning would be the same, as the verbs "has made" and "has created" cover all past time, but that phrase was used to place beyond doubt the legislative intent.

It is perfectly evident that it was intended by the language—

has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death—

to put transfers which vest only a remainder interest in the donee, and transfers which convey an absolute estate either directly to the donee or in trust for his immediate benefit, upon exactly the same footing. This is indicated by their being interlocked in the same clause. And, as above shown, the fact that in the one case the donee enters immediately into the possession and enjoyment of the estate, while in the other that event is postponed until the death of the donor, affords no reason why Congress should have intended to discriminate in favor of the absolute and immediate transfer, and against any of the other described methods of passing property.

The words "at any time" have often been construed, and are given a broad signification. They

have been held to mean at "whatever time" (*Appeal of Snyder*, 95 Pa. St. 174); "at all times" (*Village of New Rochelle v. Clark*, 65 Hun. 140; 19 N. Y. Supp. 989). Thus, discretion conferred on a trial court to allow an amendment "at any time" permits an amendment after verdict (*Raymond v. Wathen*, 142 Ind. 367; 41 N. E. Rep. 815). A warrant of attorney authorizing judgment on a note "at any time" permits the entry of judgment before the maturity of the note (*Cohen v. Burgess*, 44 Ill. App. 206). A gift over upon the death of the first taker "at any time" without issue means a definite failure to issue (*Appeal of Snyder*, 95 Pa. St. 174). Power to appoint a receiver of a dissolved corporation "at any time" is not limited to the statutory period during which the corporate existence is continued (*Slaughter v. Moore*, 82 Atl. Rep. 963).

The purpose to apply this provision of the act to past transactions is also shown by the language of the second sentence in paragraph (b), which reads:

Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.

What language more positive and certain in its meaning could be used?

It is all-inclusive, and it does not contain the least suggestion that as to anyone who shall die there-

after this period within which a presumption is created shall be reduced below two years.

In short, plaintiff's insistence is that the phrase "after the passage of this act" shall be inserted before "has at any time" so as to make the paragraph read: "To the extent of any interest which the decedent *after the passage of this act* has at any time made a transfer, or with respect of which he has created a trust," etc. And furthermore, that at the end of the sentence relating to the creation of a presumption there shall be added "*provided such disposition or distribution has been made after the passage of this act.*" But such insertions are not explanatory, but clearly alter the plain meaning of the language used. In fact they would create an important exception, which Congress refused or failed to do, although it did expressly except "bona fide sales for a fair consideration in money or money's worth."

It is said that the phrases "has at any time made a transfer" and "has created a trust" speak, not with reference to the date of the passage of the statute, but with reference to a future event, to wit, the death of the donor. That is precisely correct. Therefore it is not a retroactive statute though construed as insisted upon by defendant. The tax in no instance arises from the happening of a past event. It applies only to future deaths. But it does apply to *every* future death *alike*. There is no discrimination made among those who shall die after the passage of the act, as plaintiff insists there shall be. The inquiry to determine the amount of the

tax begins at the death of the donor, a future event, and it goes back as far as the words "has at any time" will take it; and they have no limitation.

Statutes of this character having a retroactive effect were familiar when this act was passed.

The plaintiff's theory is that the inclusion of transfers made prior to the passage of the statute was a peculiar and unheard of thing,—something which could not have been intended by Congress, and against which every presumption must be made. This theory is wholly without foundation. Such provisions have been a familiar feature of inheritance tax statutes for over sixty years.

The English Succession Duty Act of 1853 imposed a tax upon every "succession" as defined, and provided that "Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, . . . shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition . . . a 'succession'" (16 and 17 Vict., Ch. 51, secs. 2, 10). These provisions were held to embrace interests vesting under instruments executed prior to the date when the act took effect, but coming into possession after that date.

Wilcox v. Smith, 4 Drew, 50.

Attorney General v. Fitzjohn, 2 H. & N. 465.

Attorney General v. Lord Middleton, 3 H. & N. 125.

This was held though the act was passed on May 19, 1853, but did not become effective until August 4, 1853 (Sec. 54); and it was thus possible to give effect to the word "past" by including transfers between May 19 and August 4. The court, however, refused to impose this limitation upon the words of the act, saying:

As to the words "past or future disposition," it appears to me that "past" means previously to the passing of the act * * * It is suggested that the word "past" means previously to the passing of the act, not, however, at any remote period, but only at some time between the commencement of the taking effect of the act and the date of its passing. That would be a limitation of the meaning of the word, and unless I find strong grounds in the whole act to induce me to conclude that such a limitation was intended, I ought not to import it; and I see no such ground" (*Vice-Chancellor Kindersley in Wilcox v. Smith*, 4 Drew. 50).

The words of the second section are "every past or future disposition of property." This language must be considered as uttered by the legislature on the last moment of the 18th May, 1853, so as to come into operation on the first moment of the 19th May, 1853, and then every past disposition of property means "every disposition of property anterior to the 19th May, 1853, * * * by reason whereof any person has or shall become beneficially entitled to any property or the income thereof, upon the death of any person dying after the

time appointed for the commencement of this Act. * * * The word 'past' in the second section * * * must be read as if the act passed on the last moment of the 18th May, 1853. The word 'has' is to be taken as if uttered at that time; and I cannot accept the argument that the word 'has' has crept in to supply the interval between May and August" (*Attorney General v. Lord Middleton*, 3 H. & N. 125, 136-137).

The Succession Duty Act passed by Congress in 1864 (Act of June 30, 1864, 13 Stat. Ch. 173, Secs. 126, 150) is clearly modeled upon the English Act. Like the English Act, it taxed as a "succession" "every past and future disposition of property," the provision being confined to real estate (Sec. 127). This act came up for construction in the leading case of *Wright v. Blakeslee* (101 U. S. 174); and the court held that it imposed a tax upon a remainder, the title to which vested in 1846, but which did not come into the possession of the remainderman until after the statute took effect.

Thus it is clear that for a long period prior to the Revenue Act of 1916 the taxation of a "succession" to property, although the right had come into existence by an instrument previously executed, was a familiar concept. The next step was the taxation of transfers created by instruments executed prior to the statute, even without a "succession" to the property thereafter. This also had become a familiar matter long before the passage of the act now in question.

The English Customs and Inland Revenue Act of 1881 provided a stamp tax upon "accounts delivered of the personal or movable property" of a decedent. The statute described the property to be included in the account, embracing among other things "any property taken as a *donatio mortis causa* made by any person dying on or after the first day of June, one thousand eight hundred and eighty-one, or taken under a voluntary disposition, made by any person so dying, *purporting to operate as an immediate gift inter vivos* whether by way of transfer, delivery, *declaration of trust* or otherwise, which shall not have been *bona fide* made three months before the death of the deceased" (44 and 45 Vict. Ch. 12, Sec. 38, subsec. (a), par. (a)). Eight years later the tax was extended to embrace gifts made within twelve months of the decedent's death (52 and 53 Vict. Ch. 7, Sec. 11, subsec. (1)).

The question of the meaning of the provision as to gifts *inter vivos* was quickly raised and settled. *Attorney General v. Booth*, 63 L. J., Q. B. 356.

In that case it appeared that the decedent had made gifts of one thousand pounds and five hundred pounds within five years of his death for the use of the Salvation Army. It appeared that, "The money was in both cases given out and out, without any reservation or condition in favor of the donor, and was not given in contemplation of death." It was contended that, "These gifts are absolute and immediate, and do not come within the mischief of the statutes, which are intended to prevent gifts which are

merely colorable gifts on death given to avoid probate duty." It was also urged that an adverse ruling would discourage gifts to charities. Mathew, J., however, said: "I am of opinion that these gifts are plainly within the statute; and judgment must go for the Crown;" and Cave, J., concurred.

The liability to tax of such absolute gifts was subsequently treated as a closed question.

In re Foster, 1 Ch. (1897) 484;

In re Beddington, 1 Ch. Div. (1900) 771.

In 1894 an "estate duty" was substituted for the various probate and legacy taxes (Finance Act of 1894; 57 and 58 Vict. Ch. 30). This act provided: "In the case of every person dying after the commencement of this Part of this Act, there shall * * * be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such a person a duty, called 'Estate Duty'," etc. (Sec. 1).

It was next provided that "Property passing on the death of the deceased *shall be deemed to include*," among other things, property required to be included in an account under Section 33 of the Customs and Inland Revenue Act of 1881, as amended; that is, property transferred by gift *inter vivos* made within twelve months of the decedent's death. This provision was amended as follows by the Finance Act of 1909-1910:

"In the case of a person dying on or after the thirtieth day of April, 1909, the period

preceding the death of the deceased before which a disposition purporting to operate as an immediate gift *inter vivos* must have been made, * * * in order that the property taken under the disposition * * * may not be included as property passing on the death of the deceased, shall be three years instead of twelve months before the death," etc. (10 Edw. 7, Ch. 8, sec. 59, (1)).

It was also provided that so much of the Finance Act of 1894 "as makes gifts *inter vivos* property which is deemed to pass on the death of the deceased, shall not apply" to gifts in consideration of marriage, and certain other specified gifts (Id. par. 2). Property passing by such a gift was again referred to as "*deemed to be property passing on the death of the deceased*" (Id. par. 3).

It thus appears that the imposition of a tax, in the nature of a death duty, with reference to absolute transfers of property made before the passage of the taxing act, where the donor dies while the act is in operation, so far from being novel and extraordinary was a familiar incident of such taxation.

There is, in fact, a striking similarity between what was done by Congress in 1916 and what had previously been done in England. In England gifts, though absolute, were held to have a testamentary character solely by reason of their execution within a specified period of death. This period, at first three months, was lengthened to three years. Such gifts were "*deemed*" to pass at death, and held to be a proper subject for inheritance taxation. The

Revenue Act of 1916 did something far less drastic. It taxed only such gifts as were in fact due to the "contemplation of death," or were in the form of trusts to take effect at or after death. The time of execution was merely made *prima facie* evidence of this fact.

The present statute was thus not "so beyond the normal and usual exercise of the taxing power as to cause it to be, when exerted, of rare occurrence and in the fullest sense exceptional" (*United States v. Goellet*, 232 U. S. 293, 297). It was, on the contrary, a familiar exercise of legislative power; and there is no reason whatever for refusing to give to the language used its plain, natural meaning.

The principal reasons assigned why transfers made in contemplation of death prior to the passage of the act should be excepted are as follows:

- (1) **That laws imposing special taxes are liberally construed in favor of the taxpayer.**

As said by this court in *Eidman v. Martinez*, 184 U. S. 583, and quoted in plaintiff's brief filed February 21, 1922 (p. 41):

It is an old and familiar rule of the English Courts, applicable to all forms of taxation, and particularly special taxes, that the Sovereign is bound to express its intention to tax in clear and unambiguous language, and that a liberal construction be given to words of exception confining the operation of duty [citing authorities], though the rule regarding exemptions from general laws imposing taxes may be different [citing authorities].

We have ourselves had repeated occasion to hold that the custom revenue laws should be liberally interpreted in favor of the importer, and that the intent of Congress to impose or increase a tax upon imports should be expressed in clear and unambiguous language (p. 583).

Attention is called to the exact language of the court, to wit, that *exceptions* will be liberally construed in favor of the taxpayer, but that exemptions will be construed otherwise. Here Congress *expressly excepted transfers made in good faith and for a fair consideration, but made no other exception*. Therefore the rule stated has no application here.

The well recognized rule is as stated in *Gould v. Gould*, 245 U. S. 151, to wit:

In the interpretation of statutes levying taxes it is the established rule not to *extend* their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen.

But the District Court and the Circuit Court of Appeals both have held that the intent of the language of this act is to include transfers made in contemplation of death before its passage provided the transferrer dies after its enactment, and it in fact admits of no other meaning unless it be materially altered; and to so hold is in no sense an *extension* of the statute by implication.

- (2) That to construe the statute as applying to estates vested when it was enacted would render it unconstitutional, or present a serious question as to its constitutionality.

This question has heretofore been disposed of in discussing the constitutionality of the act. However, this insistence is entitled to serious consideration in construing state legislation, and is the reason why state courts have construed inheritance and estate tax statutes more strictly than has this court.

- (3) That unless the language of the act indicates that Congress intended that it should have a retroactive effect, it will not be so construed.

This is a well recognized principle. But as heretofore shown, this is not a retroactive statute, as it applies only to deaths occurring after its passage. However, when a taxing act is plainly retrospective by its terms the courts do not hesitate to so construe them. A number of such cases have heretofore been cited in discussing the validity of the act; and we also call the court's attention to the following additional authorities which bear directly on this question. In *Cooley on Taxation* (3d ed.), vol. 1, pp. 492-494, it is said:

Unless the Constitution prohibits retrospective legislation, the basis of an assessment of taxes may as lawfully be retrospective as the reverse; that is to say, it may as well have regard to benefits theretofore received as to those which may be assessed thereafter. It has therefore been very properly held that there is no constitutional or other legal objection to the levy of taxes to pay for municipal improvements which had previously been made, or to the assessment or reassessment of taxes upon

property which had escaped taxation, or had been grossly undervalued for taxation in previous years. Nor in apportioning the tax between individuals is there any valid objection to making it on consideration of a state of things that may not have come to an end; as where a tax is imposed on the extent of one's business for the preceding year instead of upon an estimate of the business for the year to come. Where taxes are levied for a series of years upon the same valuation of property, they are necessarily retrospective, but not therefore incompetent, though one may be taxed upon property which he has long ceased to own when the tax is levied.

Especial attention is called to *Wright v. Blakeslee*, 101 U. S. (11 Otto) 174, 176, 177; because that case required the construction of a statute similar to the present one. The statute there construed read as follows:

That every past or future disposition of real estate by will, deed, or laws of descent, by reason whereof any person shall become beneficially entitled, in possession or expectancy, to any real estate or the income thereof, upon the death of any person dying after the passing of this act, shall be deemed to confer on the person entitled by reason of any such disposition a "succession"; and the term "successor" shall denote the grantor, testator, ancestor, or other person from whom the interest of the successor has been or shall be derived. (Sec. 14, act June 30, 1864, ch. 173, 13 Stat. 287.)

The material facts were that Henry Huntington died in October, 1846, nearly eighteen years after the passage of the act, having devised to his executors certain real estate in trust, the proceeds thereof to be applied to the use of his daughter Henrietta during her life, and at her death to her issue, if any should survive her. When Huntington died his daughter was married and had two children. She died in September, 1865, and left two children surviving her; and the assessment was made upon the estate, of which the two children took possession. There, as here, it was insisted that the act should not be construed to include the transfer or succession, because the instrument creating it had become effective long before the passage of the act. In passing upon that question the trial court said:

It seems very clear that, by a past disposition of real estate by will, the assignors of the plaintiff had a vested estate in expectancy during the life of their mother, and, upon her death, after the Act was passed, became "beneficially entitled in possession" to the real estate. The concurrence of these conditions, conferred on the issue a succession, and made them successors, within the plain definition of Section 127. The argument for the plaintiff is, that the person creating the estate, or from whom it is derived, must die *after the passing of the act*, to confer the succession defined. Such is not the language of the section. It suffices if, by the death of any person dying after the passing of the act, the devisee becomes beneficially entitled in

possession to the estate. By the death of the mother, the children, who theretofore had an estate in expectancy, became beneficially entitled in possession. (13 Blatch. 421, 30 Fed. Cases No. 18072.)

And in affirming the lower court's construction of the statute this court said:

It is suggested that as the act refers to the acquisition of estates "in possession or expectancy," it can not mean to embrace estates which had already accrued as estates "in expectancy" before the act was passed. But such an implication can not be allowed to prevail against the express words of the act, which include all estates to which a person should become beneficially entitled upon the death of any person dying after the passage of the act. In the present case, the children of Henrietta Wright first became "beneficially entitled" to the property in question at their mother's death. They then became "beneficially entitled in possession" (p. 177).

What distinction can be drawn between "of which the decedent has at any time made a transfer," the language of the act of 1916, and "every past or future disposition," the language used in the act of 1864? Both alike include every past transfer or disposition of property, and one is as unlimited as the other.

In *Billings v. United States*, 232 U. S. 261, 279, wherein the validity of section 37 of the tariff act of 1909 was questioned, the court said:

Was the tax due on the first day of September, 1909, or was it only due on the first day

of September, 1910: In view of the positive direction that the tax shall be levied and collected on the first day of September, we can see no escape from the conclusion that the court below was right in holding that it became due on the first day of September after the passage of the act. The word "annually," upon which so much reliance to the contrary is placed, is manifestly used not for the purpose of postponing the time of payment, but rather as provision for continuity; that is, the word but shows the purpose of fixing the annual duty of levying and collecting the tax on the designated day (p. 279).

As heretofore shown, the English statutes have all been construed as applying to transactions before their passage whenever their language indicated such intention; and the construction of those statutes is entitled to great weight, because this class of American statutes was taken from them. And, moreover, Congress, like Parliament, has no constitutional prohibition against the enactment of a retroactive tax law as have the legislatures of the several States.

(4) That inheritance tax statutes similar to the Act of September 8, 1916, have been so construed.

A sufficient number of the cases cited in the elaborate and able briefs filed by plaintiff's counsel will be considered to show that this claim is not well founded.

In *Lacey v. State Treasurer* (152 Iowa 477) the statute in question provided that "all property
* * * which *shall* pass * * * by deed, grant,

sale or gift made or intended to take effect in possession or in enjoyment after the death of the grantor, etc. * * * shall be subject" to the specified tax (Iowa Code, Sec. 1467). It was held that this did not embrace interests passing under deeds executed before the passage of the statute. There was nothing in the statute requiring that it be extended to deeds, grants, etc., executed before the effective date of the act. The phrase "at any time" is conspicuously absent; and the prospective character of the statute is indicated by the word "shall".

It is asserted in plaintiff's brief filed February 21, 1922, that the case of *Commonwealth v. McCauley's Exor.*, 166 Ky. 450, 453, is *directly in point*. The provision of the statute there construed reads as follows:

All property which *shall* [italics the court's] pass, by will or by the intestate laws in this State, from any person who may die seized or possessed of the same while a resident of this State, or, if such decedent was not a resident of this State at the time of death, which property, or any part thereof, shall be within this State, or any interest therein, or income therefrom, which shall be transferred by deed, grant, sale or gift, made in contemplation of the death of the grantor or bargainor, or intended to take effect in possession or enjoyment after such death, to any person or persons, etc.

There is certainly a very marked difference between the language "*shall pass*" and "*which shall be transferred*" used in that act and "*has at any time made a*

transfer," and "*has created a trust*" used in the act here under consideration. In fact, the Kentucky statute could not have been construed retroactively without doing violence to its positive language.

In *State Ex rel Tozer v. Probate Court* (102 Minn. 268) the statute in question imposed a tax "upon all inheritances, devises, bequests, legacies and gifts of every kind and description, of any and all persons and corporations," etc. (Laws of 1905, Ch. 288, sec. 1). The entire discussion was whether the transaction, which was a very complicated one, actually vested the title to the property at the time in Tozer's wife and children; and it was assumed that if it did the statute did not apply, because the language required no such construction, and if so construed it would violate Article I, Section 10 and the Fourteenth Amendment of the Constitution of the United States, and also the constitution of the State of Minnesota.

Folsom v. United States (21 Fed. Rep. 37) involved the federal succession tax act of June 30, 1864; and the holding of the court appears to have been in direct conflict with *Wright v. Blakeslee* (101 U. S. 174), wherein it was held that the statute imposed a tax upon remainders created before it took effect but vesting in possession thereafter.

In *McClain v. Pennsylvania Company* (108 Fed. Rep. 618) the court had under consideration Section 20 of the Act of June 13, 1898 (30 Stat. 464), imposing a tax upon "legacies or distributive shares . . . passing after the passage of this act." It was necessarily held that legacies or distributive shares passed

at the death of the testator or intestate, and hence that the statute could not apply to the estate of a person dying before it took effect. That case cannot have the slightest application to the present one.

In *Commonwealth v. Wellford* (114 Va. 372) the statute in question provided "That where any estate * * * of any decedent *shall pass*, under his will, or the laws regulating descents and distributions, to any other person * * * the estate so passing shall be subject to a tax," etc. (Acts, 1895-6, Ch. 334, sec. 1). The language was plainly prospective, and was held not to affect an interest which had vested under the will of a person dying before the passage of the statute.

In *State v. Safe Deposit & Trust Company* (132 Md. 251) the court had under consideration a statute providing that "all estates * * * passing from any person who may die seized and possessed thereof * * * to any person or persons, etc. * * * shall be subject to a tax," etc. (Code, Art. 81, sec. 120). It was held that the increased rate of tax contained in the act did not apply to a remainder when taken under the will of a decedent dying before the passage of the statute, even though the estate vested in possession after that date. As the court said, there was "no express language in the act which will bear out this contention," and referred to the fact that it used the words "*shall* be subject."

(5) That in the Revenue Act of 1919 (Sec. 402 (c); 40 Stat. 1057, 1097) Congress inserted the following: "whether such transfer or trust is made or created before or after the passage of this act."

It is insisted that the insertion of this clause indicates that Congress recognized that transfers made before the passage of the act would not be included in the absence of such language. On the other hand, it is insisted by the defendant that the insertion of these words was explanatory of what the language meant, and that by it Congress intended to declare in the most positive terms, by language that would admit of no caviling, that such was its intention in passing the previous act.

There are two lines of cases relating to the modification of the language of legislative acts by subsequent legislation, one of which supports the contention of plaintiff and the other that of defendant. Plaintiff cites a number of cases which it is insisted are easily distinguishable from this case; but in the last briefs filed in the companion cases special stress is laid upon two recent cases decided by this court, one of which involved the construction of the act here under consideration, to wit, *United States v. Field*, 256 U. S. 257, and *Smietanka v. First Trust and Savings Bank*, decided February 27, 1922.

In the *Field* case the question was whether or not an estate which passed under the exercise of a power of appointment was included in the terms of the statute. The court, after carefully analyzing paragraphs (a) and (b) of section 202, held, first, that it was not included in paragraph (a), because the

estate was not subject to the payment of the charges against the estate of the party exercising the power, and was not subject to distribution as part of her estate; and, second, it was not included in paragraph (b) because that clause "is aptly descriptive of a transfer of an interest in decedent's own property in his lifetime, intended to take effect at or after his death. It can not, without undue laxity of construction, be made to cover a transfer resulting from testamentary execution by decedent of a power of appointment over property not his own." The court further said that, "it would have been easy for Congress to express a purpose to tax property passing under a general power of appointment exercised by decedent had such a purpose existed; and none was expressed in the act under consideration"; but that the act of February 24, 1919, "contains a clause precisely to the point [quoting clause]. Its insertion indicates that Congress at least was doubtful whether the previous act included property passing by appointment."

There the court followed the plain language of the statute, and refused to include an estate passing under the exercise of an appointment, because there was no language of the statute which justified its inclusion.

In the *Smietanka* case the question was whether an income held and accumulated by a trustee for the benefit of unborn and unascertained persons was taxable under the income tax law of 1913. After a careful analysis of the statute the court held that

such income did not fall within its provisions; and with reference to its subsequent inclusion by act of Congress the court said:

The act of September 8, 1916, 39 Stat. 757, specifically declared that the income accumulated in trust for the benefit of unborn or unascertained persons should be taxed and assessed to the trustee. It is obvious that in the acts subsequent to that of 1913, Congress sought to make specific provision for the *casus omissus* in the earlier act.

Do these decisions support plaintiff's contention?

The insertions in the act of February 24, 1919, relied upon by plaintiff as changing the meaning of the law appear from the following clause of each act on the subject printed in parallel columns, the words not appearing in the first act but inserted in the last one being *in italics*:

ACT OF SEPTEMBER 8, 1916.

"(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth." . . .

ACT OF FEBRUARY 24, 1919.

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has *at any time* created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (*whether such transfer or trust is made or created before or after the passage of this act*), except in case of a bona fide sale for a fair consideration in money or money's worth." . . .

We also call the court's attention to a slight change in section 201 as it appears in section 401 of the act of February 24, 1919. Section 201 of the act of 1916 reads as follows:

That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, etc.

Section 401 of the act of 1919 reads:

That (in lieu of the tax imposed by Title II of the revenue act of 1916, as amended, and in lieu of the tax imposed by Title IX of the revenue act of 1917) a tax equal to *the sum of* the following percentages of the value of the net estate, etc.

It is apparent that the principle applicable to the insertion of paragraphs (e) and (f) of the act of 1919, which require the inclusion of property passing under a general power of appointment exercised by the decedent, and of the amount receivable by an executor as insurance under policies taken out by the decedent upon his own life, does not apply to the changes in phraseology in section 201 and section 202, paragraph (b), as shown above. Certainly the words "the sum of" were inserted to improve and make certain the language of the act. It is equally certain that the phrase "at any time" appearing in paragraph (c), section 402, of the act of 1919 was inserted for the same purpose. The most critical lexicographer can not distinguish between the meaning of that clause as it appears in the two acts, and certainly Congress could have had no other purpose than to simply clarify its meaning. We insist that precisely the same principle applies to the insertion in parentheses of the clause "whether such transfer or trust is made or created before or after the passage of this

act." Here the object was to define with such certainty and precision the meaning of the preceding words that they would admit of no quibble by the most hypercritical.

Apparently the distinction between the two lines of decisions is this: If the inserted words change the meaning of the language of the previous statute, or add something thereto when construed *according to the obvious and usual meaning of its language*, it will then be assumed that the inserted words were intended as an amendment; but if the words inserted accord with the plain and obvious meaning of the language of the previous statute, they are taken to define and make more certain its meaning.

The following cases are cited in support of defendant's contention:

In *Bailey v. Clark* (21 Wall. 284, 288), the question was whether a statute imposing a tax upon the "capital" of bankers (14 Stat. 136) included loans. It was held that it did not, and that a later statute expressly so providing (17 Stat. 256) "was evidently intended to remove any doubt existing as to the meaning of the statute and declare its true construction and meaning."

In *Johnson v. Southern Pacific Company*, 196 U. S. 1, 21, the question was whether the words "any car," in a statute providing that cars engaged in interstate commerce should be equipped with automatic couplers, applied to locomotives. It was held that it did, and that the result was not affected by an explicit

provision to that effect in a later law (32 Stat. 943). Of the later act it was said: "This legislative recognition of the scope of the prior law fortifies and does not weaken the conclusion at which we have arrived."

In *Wetmore v. Markoe*, 196 U. S. 68, 77, it was held that a liability for past due installments of alimony was not a "debt" which might be discharged under Section 63 of the Bankruptcy Act of 1898, and that this result was not affected by a subsequent act expressly excepting alimony due or to become due from the operation of a discharge in bankruptcy. Of the later act it was said that it was "merely declaratory of the true meaning and sense of the statute."

In *United States v. Coulby*, 251 Fed. 982, 985, it was held that the income tax law of 1913 did not require a member of a partnership to include as net income subject to tax moneys received by his firm as dividends on the stocks of corporations subject to income tax. An explicit provision to this effect was inserted in the income tax act of September 8, 1916 (29 Stat. 756); but the court said that "this provision was inserted in the 1916 Act to put at rest the present controversy rather than to change the law."

An illustration of this principle may be found in certain of the inheritance tax decisions. In *Matter of Reynolds' Estate*, 169 Cal. 600; 147 Pac. Rep. 268, the court had under consideration a statute amending the provision taxing transfers made "in contemplation of death" by giving a special definition

of that term, so that it was to "be taken to include that expectancy of death which actuates the mind of a person upon the execution of his will," and was not to be "restricted to that expectancy of death which actuates the mind of a person in making a gift *causa mortis*." The court said that this amendment "served the purpose of elucidating without changing the law, by giving fuller expression to the legislative intent and meaning." A later decision to the same effect is *Abstract & Title Guaranty Company v. State*, 173 Cal. 691.

(6) That transfers made in contemplation of death and to take effect immediately were included in the statute to prevent a recourse to that method of disposing of property for the purpose of avoiding the payment of the tax, and no such fraudulent motive could prompt the making of such a transfer prior to the passage of the act.

Plaintiff even insists that it must be positively shown that the transfer was made for the purpose of evading the payment of the tax before a court or jury is justified in finding that it was made in contemplation of death; and therefore that as a matter of necessity the statute cannot apply to any transfer made before its passage. This subtle process of reasoning is not at all justified by the language of the statute, or by the object which Congress manifestly had in view. The moving cause for the passage of the act was to raise revenue; and naturally Congress desired to raise as much revenue from that particular source as it could without hardship. There existed the different methods mentioned in the act of transmitting large fortunes. The one thing in common

which Congress had in mind as to all those classes was the death of the party to whom the property belonged, and whether there was a causal connection between the transfer and his death.

In other words, was death the cause of the transfer whether the transfer was made or completed after, concurrently with, or before death? If one desired to dispose of his property while living for the benefit of the public generally, like Mr. Carnegie, or to aid his children or others dependent upon or near to him, and not moved so to do by contemplation of his own death, no burden was to be imposed upon his estate for such a transfer. The intention of Congress was to make no discrimination between these several classes. It is true that the first legislation of this character was not perfect, and all of them were not included. Probably those legislators were not so very familiar with the administration of estates, and some of the methods suggested did not occur to their minds. Naturally, when some of the methods were omitted resort was more often had to them in making such transfers. If the law had applied only to those dying intestate, many would have made wills who otherwise would have permitted their property to pass under the laws of inheritance. So, it might be said that disposition by will was embraced to prevent frauds and evasions. If transfers to take effect in possession and enjoyment upon the death of the transferrer had not been included, that method certainly would have been resorted to in numerous instances instead of wills, and its inclusion tends to

prevent evasions. Precisely the same may be said of the inclusion of transfers made in contemplation of death, but to take effect immediately. The methods of disposing of property by will, by transfers to take effect in possession and enjoyment at the death of the transferrer, and by transfers made in contemplation of death, in lieu of letting it pass under the laws of inheritance, had all been in use probably ever since there had been civilized governments. And the fact that one method had been used less frequently than another does not justify the assumption that the main purpose of its inclusion was to obviate fraud. However, nothing was more natural than, when inquiry was made of Congressman Kitchin about its inclusion, for him to respond as a ready answer that if it were not included, that method would be resorted to for the purpose of defeating the payment of the tax. Nor is the fact that in a few decisions of state courts that fact has been mentioned as a reason why such method is included, even persuasive that such was the primary object Congress had in mind.

What Congress really intended was to embrace every avenue so as to procure the entire tax to which the Government is entitled from that source, and that regardless of whether the motive to defraud inspired the transfer of the property or not. It is as absurd to say that a transfer made with no fraudulent design before the act was passed is not included as to say the same thing about such a transfer made after its passage; and indeed if a transfer of either kind be excluded because not made for a fraudulent

purpose the inclusion of any transfer made in good faith cannot be justified. In fact the use of the term "fraud" in the sense imputed to it by plaintiff finds no justification in the language of the statute. There are two kinds of fraud well known to the legal profession, one actual and the other constructive, or fraud in law. One involves a fraudulent motive, the other has no dependence whatever upon the motive; but the result in the one case is equally as harmful to the person affected as in the other. Thus a voluntary conveyance by a debtor is as hurtful to his creditors as one made for the fraudulent purpose of defeating the payment of his debts; and therefore the one is set aside solely because of the effect of the transfer, while the other may be set aside because of the fraudulent motive of the transferrer and transferee, regardless of whether a consideration passed or not. Such in fact has been declared to be the law with reference to tax upon transfers. Thus it is said in *Ross on Inh. Tax.*, Sec. 111 (quoted in plaintiff's supplemental brief on page 19):

Without a statute taxing transfers made in contemplation of death or to take effect thereon, it is very clear that many estates would pass free from taxation to the same persons to whom they would have passed had the grantor or donor made a will or died intestate, for it is not an entirely unnatural desire, and certainly not one infrequently indulged, for property owners to attempt to evade the inheritance tax, and transmit estates to the subjects of their bounty unimpaired;

and even though the transfer is not actuated by any such motive, its practical effect, so far as the public revenue is concerned, is the same. It is the purpose of such statutes to preclude, so far as possible, this evasion of taxation, whether with fraudulent intent or not, and to secure the state its revenue on all transfers which have their occasion in the death of the transferer.

Inasmuch, therefore, as it is immaterial whether the transfer was prompted by a fraudulent intent but liability for the tax depends entirely upon whether the transfer was made in contemplation of death, the matter of fraud should not be considered in determining whether the statute applies to transfers made before the passage of the act or not. In other words, the matter to be considered is whether revenue would be lost, either by design or innocently, if this class of transfers were not included. And as the primary object of Congress was to raise revenue, the presumption is that every individual transfer falling within the reasonable meaning of the language used to describe any class is included.

III.

THE TRIAL COURT DID NOT ERR IN DEFINING IN ITS CHARGE TO THE JURY THE MEANING OF THE TERM "IN CONTEMPLATION OF DEATH" AS USED IN THE ACT OF SEPTEMBER 8, 1916.

In defining this expression to the jury, the court said:

The defendant claims that that transfer was rightfully taken into consideration be-

cause the property was transferred by Mrs. Dickel in contemplation of her death.

That presents the sole question for your determination: did Mrs. Dickel, in April, 1915, transfer to the Detroit Trust Company the trust property, in contemplation of death; that is to say, at the time of making the transfer, did she have in contemplation her own death *and was that the reason for making the transfer to the Detroit Trust Company?*

By the term "in contemplation of death" is not meant on the one hand the general expectancy of death which is entertained by all persons, for every person knows that he must die. That is not what is meant by the term "in contemplation of death." On the other hand, the meaning of the term is not necessarily limited to an expectancy of immediate death or a dying condition. We speak of gifts *causa mortis*, that is, gifts made because the person is in death or is dying. That condition is not what is meant. The term "in contemplation of death" involves something between these two extremes. Nor is it necessary, in order to constitute a transfer in contemplation of death, that the conveyance or transfer be made while death is imminent, while it is immediately impending by reason of bodily condition, ill health, disease or injury or something of that kind. *But a transfer may be said to be made in contemplation of death if the expectation or anticipation of death in either the immediate or reasonably distant future is the moving cause of the transfer. And in this case if you find that Mrs. Dickel,*

in April, 1915, was moved to create the trust and to make the transfer to the Detroit Trust Company by her expectation or anticipation of death in either the immediate or the reasonably distant future, then you will be warranted in finding that this transfer was made in contemplation of death.

On the other hand, if you find from the evidence in the case that the moving cause of the making of this transfer or the creation of the trust to the Detroit Trust Company, was not her expectation or anticipation of death, you must find that the transfer was not made by her in contemplation of death. (R. 167, 168.)

Plaintiff's contention as to the meaning of this term is expressed in the following request, which the court refused to charge:

The Act of Congress of September 8, 1916, provides, in substance, that the value of the gross estate of the decedent shall be determined by including the value at the time of her death, of all property, real or personal, to the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which she has created a trust in contemplation of death. I charge you that the words "in contemplation of death" do not refer to that general expectation of death which every mortal entertains, *but rather the apprehension which arises from some existing condition of body or some impending peril.* (R. 157.)

This court is for the first time called upon to construe this term as it appears in the federal statutes imposing a transfer tax. The pivotal word is "contemplation," a word in common use and with a very definite and well understood meaning. It is defined by Webster as "The act of the mind in considering with attention; continued attention of the mind to a particular subject; meditation." One definition by the Standard Dictionary is "Deliberation on something to be done, as of taking a journey." Therefore, it must here mean meditation or deliberation upon death.

There is nothing in the context of the statute to warrant any modification of this familiar meaning of the word.

But plaintiff insists that there should be substituted for it the word "apprehension," which, as here used, is defined as "Distrust or fear at the prospect of future evil, accompanied with uneasiness of mind"; and, further, that the evil from which the fear arises and which causes the uneasiness of mind shall be one or the other of two definite things, either "an existing condition of the body" or an "impending peril." In other words, one must have a pronounced heart trouble or its equivalent, or some one must be seeking his life or the equivalent of such circumstance, and the fear arising from such disease or threat must be the moving cause of the transfer.

Can such a distortion of words be justified by any rule of construction based on common sense? The intrinsic meaning of the word "contemplate," the idea excited in the mind by the mention of the word,

is directly contrary to such conception. It implies meditation, or deliberation, as opposed to haste excited by fear or apprehension.

Is not every reason against imputing such a meaning to these words when used in a statute of this kind? If one makes a will, regardless of how remote from his death it may be and how long he may expect to live, the transfer of the estate under the will is subject to the tax. The same is true if he conveys a remainder interest in the estate reserving its use and enjoyment to himself for life. But it is insisted, if he donates it absolutely, to take effect at once, so that the transferee enters immediately upon its possession and enjoyment, though such transfer was intended to operate and did operate in lieu of a will, yet it is not taxable unless it was made because of a fear of death superinduced by an existing disease or a threatened danger.

Effort has heretofore been made to show that there is no just reason why such a disposition of property should be specially favored, as the only difference in fact is that the transferee thereby obtains the use and enjoyment of the property at an earlier date than he otherwise would, which certainly affords no ground for complaint. And the idea that it was intended to permit such a discrimination, and that the term as here used should be construed as contended for by plaintiff, is necessarily excluded by that provision of the statute which declares that any transfer of a material part of his property without a fair consideration made

within two years prior to his death shall, unless shown to the contrary, be deemed "to have been made in contemplation of death within the meaning of this title." The fact of the death of the transferrer within two years is sufficient proof that the transfer was made in contemplation of death, but such fact is no special proof, and the statute does not require that it shall be any proof, that during that entire period of time the transferrer feared death from an existing disease or a threatened danger. In fact, it is not the rule that a specific disease or a threatened danger, the fear of death from which excites one to dispose of his property, exists for any such length of time before death. The statute, therefore, contemplates that the transfer may be the result of meditation upon death without the mind being at all affected by any known disease or threatened danger.

The definition of this term by some courts affords a striking example of how confusion and conflict in decisions must arise when effort is made by courts to legislate by construction rather than give the plain and ordinary meaning to the language used in legislation. The uncertainty was so marked in this instance that finally the legislatures of some States determined to define the term themselves and not leave the subject to misconstruction by the courts, because of their tendency to follow precedents. So we find the expression thus defined by the legislature of Tennessee, the State in which Mr. Shwab resided:

* * * the words "in contemplation of death" shall be taken to include that expectancy of death which actuates the mind of a person on the execution of his last will and testament, it being the intention to include within the provisions of this act all transfers, made in lieu of, or for the purpose of avoiding transfers by last will and testament, or by the intestate laws. (Acts, 1919, Ch. 46, sec. 1, p. 120.)

And it can not be doubted that such was the meaning intended by the first legislative body that used the expression. That is, if the transfer is made or trust created from the same motive that ordinarily prompts the making of a will, it is made in contemplation of death, just as the execution of a will is always induced by the contemplation of death.

It is not to be wondered at that Mr. Shwab was not willing for this million dollar estate to pass to him and his children in a State imposing a transfer tax under that definition.

MEANING OF "IN CONTEMPLATION OF DEATH" AS DEFINED BY THE COURTS.

A consideration of the decisions of courts wherein this term has been defined will show both the confusion in the decisions and how such confusion arose.

Plaintiff relies principally as authority for the definition which the court was requested to charge upon the decisions of the New York courts, and attention will be first given to them.

New York Cases.

Apparently the definition proposed by plaintiff found its origin in an expression used by the court in *Ridden v. Thrall*, 125 N. Y. 572, 579. The facts in that case were that one Edwards went to a hospital to have an operation performed which he apprehended might cause his death. The day before he went to the hospital he handed to the plaintiff a box, and said that if he did not return he gave him the box and its contents. He died in the hospital, after the operation but from another disease than the one for which the operation was performed, and the question was whether the delivery of the box and its contents was under the circumstances a gift *causa mortis*. In defining such gift the court said:

The gift must be made *under the apprehension of death from some present disease or some other impending peril*, and it becomes void by recovery from the disease or escape from the peril.

When the court thus defined a gift *causa mortis* no tax statute was before the court, and of course the term here under consideration was not had in mind at all.

In *Matter of Seaman*, 147 N. Y. 69, 76, the court was construing certain provisions of the transfer tax act of 1892. Seaman had executed a will in 1876 by which he devised his residuary estate in trust, the proceeds to be paid over to an adopted daughter during her life and after her death to other parties designated; and the question was whether the vest-

ing of possession in the remainder which occurred at the time of the adopted daughter's death, after the passage of the act, was taxable. Of course the provision relating to transfers in contemplation of death was not before the court for construction; but the court in referring to the different clauses of the statute quoted the clause containing the provision relating to such transfers, and then incidentally remarked:

At this point are evidently referred to grants or gifts *causa mortis*; that is, those effecting the result of a will or of intestacy by a grant or gift made during life, and so by a different process (p. 76).

This incidental statement was made without any consideration of the question; and, of course, was wholly erroneous, as a gift *causa mortis* was included in the other provision of the statute which imposed a tax on transfers to become effective at the death of the transferrer. But this casual remark was subsequently taken by some judges as an authoritative construction that the term "in contemplation of death" referred only to gifts *causa mortis*.

Thus *In re Edgerton's Estate*, 54 N. Y. Supp. 700, 703, which involved the transfer of a considerable property some time before the death of the transferrer, in reply to the insistence that the transfer was made in contemplation of death, the court said:

That provision was under consideration in *In re Seaman's Estate*, 147 N. Y. 69, 76, and was construed to refer to grants or gifts *causa*

mortis. The transfers here in question were not such gifts or grants, for there was no power of revocation (p. 703).

Of course plaintiff does not insist, because such an insistence would be too absurd for consideration, that this provision in the statute has no application to a transfer made in contemplation of death unless it be revocable, and yet such was the construction which was there given it.

So in *Re Spaulding's Estate*, 63 N. Y. 694, 698, 699, which involved gifts *inter vivos*, the court referred to the distinction made in *Ridden v. Thra'* between such gifts and gifts *causa mortis*, and quoted from *In re Seaman's Estate* and *In re Edgerton's Estate* as authority that the provision here in question applied only to gifts made *causa mortis*.

But in *Re Crary's Estate*, 64 N. Y. Supp. 566, 568, the surrogate court of Broome County took a different view of the statute, and held that it applied to gifts *inter vivos*, saying:

The statute was evidently intended to reach absolute transfers of property when made under a certain condition, viz, when the transferror was contemplating death; that is, the thought of death has taken so firm a hold on his mind as to control and dictate his actions regarding his property, and the business is transacted while contemplating death, and considering what conditions would arise or exist in the event of death without making the transfer, or, to be more specific, the contemplation of death is the sole motive and cause of the transfer (p. 568).

But in *In re Baker's Estate*, 82 N. Y. Supp. 390, 391, the court on the authority of *In re Spaulding's Estate*, *In re Seaman's Estate*, and *In re Mahlstedts Estate* (in which no definition of the term was actually made) gave the definition in substantially the form of the request submitted to the trial court by the plaintiff, thus:

This court has held that the words "in contemplation of death" do not refer to that general expectation which every mortal entertains, but rather the apprehension which arises from some existing condition of body or some impending peril.

However, six years later (1909) the surrogate court of New York County in *In re Price's Estate*, 116 N. Y. Supp., 283, 284, after expressly repudiating the definition given in the cases above cited, said:

As the statute of 1887 applied to gifts causa mortis, the amendment of 1892, extending the operation of the act to gifts made in contemplation of death, would seem to indicate an intent on the part of the Legislature to tax those gifts inter vivos which were made by the grantor in contemplation of death, and which would escape taxation under the language of the statute of 1887. It would therefore appear that, in determining whether the gift was made in contemplation of death, the courts should not be restricted to those cases where the circumstances (such as that the gift was made when the donor was in extremis, or was dangerously ill, or in danger of immediate death, or afflicted with an acute disease) would indicate

the existence of those conditions necessarily requisite to the validity of a gift *causa mortis*, but rather that the facts and circumstances surrounding the making of the gift be taken into consideration and a determination arrived at as to whether such facts and circumstances indicate that the gift was made while the donor contemplated the probability of his own death in the immediate future, or whether or not the imminence of the donor's death was in any substantial sense a direct cause of such gift. *Matter of Palmer*, 117 App. Div. 360, 102 N. Y. Supp. 236; *Rosenthal v. People*, 211 Ill. 309, 71 N. E. 1121.

Apparently, therefore, there is, up to the present time, no authoritative definition of the term "in contemplation of death" by the courts of New York.

Illinois Cases.

Some reliance is had by plaintiff upon definitions given by the supreme court of Illinois, but an analysis of those cases will show that they do not support plaintiff's contention.

In *Rosenthal v. The People*, 211 Ill. 306, 309, the court, in referring to this provision of the inheritance tax act, said:

While the statute was doubtless not intended to impose limitation on the right of a person to give away his property whenever he might see fit, the intention clearly was to tax property passing by will or the intestate laws of the State, or by such gifts or transfers as are of like nature and can properly be classed therewith (p. 309).

And again:

Similar language is used respecting business transactions, such as settlements in contemplation of marriage; or a fraudulent intent may be involved, as in transfers in contemplation of insolvency or bankruptcy. *A gift is made in contemplation of an event when it is made in expectation of that event and having it in view, and a gift made when the donor is looking forward to his death as impending, and in view of that event, is within the language of the statute (p. 309).*

This definition is broader than that given to the jury by the trial court.

In *Merrifield v. The People*, 212 Ill. 400, 405, the court, in discussing the meaning of the provision of the statute relating to transfers in contemplation of death, said:

It is said, however, by appellants, that a transfer of property made without consideration, in contemplation of death, is a gift *causa mortis*, and that the stipulation is that the gift was absolute, hence it could not be a gift *causa mortis*, as a gift *causa mortis* is conditioned upon the death of the donor. A gift *causa mortis*, strictly speaking, applies only to personal property, and the gift is defeated if the donor recover. In this case the subject matter of the transfers was both real and personal property, and the transfers were absolute, and not upon the condition that they should be revocable in case of the recovery of the donor. They were, however, made in

contemplation of his death. They fall, therefore, more nearly within the description gifts *inter vivos* made in contemplation of death, than within the designation gifts *causa mortis*. While no witness testified, and it was not stipulated, that the transfers were made in contemplation of the death of Leonard B. Merrifield, the county court properly reached the conclusion from the admitted facts that the transfers were made by Leonard B. Merrifield in contemplation of death. This is a new question in this court. We have examined the authorities cited and relied upon by the appellants from other States, and are of the opinion nothing is found therein inconsistent with the views herein expressed when applied to a case like this (pp. 405-406).

In *The People v. Kelley*, 218 Ill. 509, 515, the court said, citing for authority *Rosenthal v. People* and *Merrifield v. People*:

It is not the object of the statute to prevent a parent from giving the whole or any portion of his property to his children during his lifetime, if he so desire. The only effect of the statute as a revenue measure is to subject said property to an inheritance tax if the gift is made in contemplation of the death of the donor (p. 515).

In *Estate of Benton*, 234 Ill. 366, 370, it was earnestly argued that the provision of the statute applying to transfers made in contemplation of death should be construed to apply only to gifts *causa mortis*, but the court said that the contention was

more plausible than sound, and quoted with approval the definition of "in contemplation of death" given by the court in *Rosenthal v. People*.

But in *The People v. Carpenter*, 264 Ill. 400, 408, with reference to the meaning of this term, the court said:

Of course, the words "in contemplation of death," as used in these statutes, do not mean that general expectation of all rational mortals that they will die sometime, but it means an apprehension of death which arises from some existing infirmity or impending peril (p. 408).

and cited for authority *Rosenthal v. People* and *In re Estate of Benton*. It will be observed that here crept in the language contended for by plaintiff, to wit, "apprehension of death which arises from some existing infirmity or impending peril," *nothing like which appeared in the decisions cited*. The court stated that it was not claimed that the trust agreements were executed in view of death, and that the decision below did not rest on that ground. Therefore the distinction between the two definitions was not called to the court's attention; and by inadvertence the definition was taken from some other authority than the preceding Illinois decisions, probably from *In re Baker's Estate*.

Wisconsin cases.

The meaning of this term appears to have been first considered by the Supreme Court of Wisconsin in *State v. Pabst*, 139 Wis. 561, 589, and with reference to its meaning, the court said:

The meaning of the words "in contemplation of death," as used in the statute, must be inferred and ascertained from the context of the act and the object sought to be accomplished by the law. It is manifest that they were intended to cover transfers of parties who were prompted to make them by reason of the expectation of death, and which, in view of that event, accomplish transfers of the property of decedents in the nature of a testamentary disposition. It is therefore obvious that they are not used as referring to that expectation of death generally entertained by every person. The words are evidently intended to refer to *an expectation of death which arises from such a bodily or mental condition as prompts persons to dispose of their property and bestow it on those whom they regard as entitled to their bounty*. This accords with the general objects and purposes of the law, namely, the imposition of a tax on the devolution of property involved in the demise of the owner (pp. 589-590).

In *State v. Thompson*, 154 Wis. 320, 329, the definition given in the *Pabst* case was quoted with approval; but, strange to say, the court then said that—

The definition of the words "in contemplation of death" given in the *Pabst* case does not differ from that announced by the New York court in *Matter of Baker*,—

and then quotes the definition given in the *Baker* case, which is embodied in the request submitted to the trial court by plaintiff; and the court proceeded:

Neither does it differ from the interpretation put upon the words by the Illinois court in *People v. Burkhalter*, 247 Ill. 600, 604, 93 N. E. 379, where it held that contemplation of death must be the impelling motive for making the gift in order that it be subject to an inheritance tax (p. 329).

Certainly the court did not carefully analyze the definitions in the *Matter of Baker* and in *People v. Burkhalter*, or it would have observed the vital distinction between them. In fact the difference is precisely that upon which plaintiff bases its ground for error in this case. So the best that can be said for plaintiff's position with reference to the Wisconsin court is that in *State v. Thompson* the court approved both the definition he contends for, and also a definition in fact less restricted than the one given by the trial court.

California cases.

The term "in contemplation of death" appears to have been first construed in California by the district court of appeals in *Spreckels v. State*, 30 Cal. App. 363, 369; and it was there defined as follows:

. . . as counsel for the respondents with singular aptness states the proposition: "It is only when contemplation of death is the motive without which the conveyance would not be made, that a transfer may be subjected to the tax." That is, the expectation of death must be the direct, specific, and immediate animating cause of the transfer. Or, as the proposition is perhaps the more lucidly explained

as follows in Ross on Inheritance Taxation, section 117, referring to the words, "in contemplation of death," as they are used in statutes authorizing the subjection of property transferred by gift to the burdens of an inheritance tax. "They are intended to cover transfers of persons who are prompted to act by reason of the expectation of death and who thereby accomplish transmissions of property in the nature of testamentary dispositions. The words do not refer to that general expectation commonly entertained by all persons, but rather to that apprehension which arises from some existing condition of body or some impending peril" (p. 369).

The matter was considered by the supreme court in *Estate of Reynolds*, 169 Cal. 600, 603, where the court said:

Little or no aid upon the question will be found in the adjudications of other states under their varying laws, and least of all from the courts of New York, which first gave an extremely narrow construction to a gift or transfer "in contemplation of death," holding their statute to mean a gift *causa mortis*, and to be applicable to no other kinds or characters of transfers. *In re Price's Estate*, 62 Misc. Rep. 149, 116 N. Y. Supp. 283, reviews the history of the decisions of that state. Nothing in our law compels us to adopt the restricted construction put by the courts of New York upon their own statute and everything in our law directs that a liberal construction should be placed upon it to the end that its provisions be not evaded (p. 603).

Appellate Court of Indiana.

The appellate court of Indiana gave careful consideration to a number of provisions of the transfer tax statute of Indiana in *Conway's Estate v. State*, 120 N. E. 717, 720, and after saying that while it was generally held that taxation statutes will be strictly construed against the state or taxing power, nevertheless they should be fairly and reasonably construed so as to effectuate the intention of the legislature in enacting such laws (citing a number of authorities) it thus defined the expression "in contemplation of death":

The words "in contemplation of death" as used in inheritance tax statutes, do not refer to that general expectation of death entertained by all persons, but they do refer to that *expectation of death which arises from such bodily or mental conditions, irrespective of the cause in any particular case, which prompts persons to dispose of their property to those they deem entitled to their bounty.*

Those words, when employed in taxation statutes, are not restricted to the technical meaning of such phrases when applied to gifts causa mortis, but are given a reasonable and liberal interpretation, which tends to make effectual such taxation laws without destroying the right of the owner of the property to make an absolute gift of the same (p. 720).

From this review of the decisions of the several courts before whom the question has arisen it is apparent that the decided weight of authority is

against plaintiff's contention that the transfer must be the result solely of an apprehension of death arising from an existing bodily disease or a threatened danger. In fact, it can not be said that such definition is recognized to be the true one in the courts of any State. While the strongest authorities for its support are in New York, yet the decisions there are not at all in accord, and in the last and best considered case that definition is expressly repudiated. Undoubtedly the definition given to the jury by the trial court, or one even broader, is recognized to be the true one by the supreme courts of Illinois, Wisconsin and California, although in an Illinois decision, and also in a Wisconsin case, the court, after approving the definition given in previous decisions, inadvertently stated that the meaning was the same as the definition in the *Matter of Baker*, which is the one claimed as correct by the plaintiff.

But counsel for plaintiff earnestly insist that in any event the court erred in using the word "distant" instead of "close" in saying:

If you find that Mrs. Dickel, in April, 1915, was moved to create the trust and to make the transfer to the Detroit Trust Company by her expectation or anticipation of death in either the immediate or the reasonably *distant* future, then you will be warranted in finding that this transfer was made in contemplation of death. (R. 168.)

In the opinion given by the court after argument and before the jury was charged the court used the

expression "reasonably close future" (R. 165); and it is insisted that plaintiff suffered a material injury, such an injury as requires a reversal of the case, because of a vital distinction between the two expressions "reasonably close future" and "reasonably distant future." While the statute does provide that, if the death occurs within two years of the making of the transfer, the transfer shall be, in the absence of proof to the contrary, deemed to have been made in contemplation of death, yet it fixes no exact time beyond which any presumption arises as against the tax and in favor of the transferrer. The time existing between the date of the transfer and the death of the decedent is only important as a matter of evidence. Therefore, it was unnecessary for the court to suggest any specified length of time between the death and the transfer; but the jury should have been left to determine whether the transfer was made in contemplation of death from all the evidence, including that of lapse of time. Consequently if this statement of the court was error at all, it was in plaintiff's favor. Certainly, however, the criticism directed against the use of the word "distant" instead of "close" is too highly technical to warrant a reversal on that ground. Both words in this connection have relation to lapse of time. The word "close" implies a measurement of time beginning at the happening of the event and extending away from it, while the word "distant" implies beginning away from the event and measuring towards it. Therefore, the expression "reasonably close" used by the court in its opinion referred

to a period reasonably distant from the event measuring away from it, while the expression "reasonably distant" used in the charge referred to a point reasonably close to or distant from the event measuring towards it.

IV.

THE TRIAL COURT DID NOT ERR IN THAT PART OF THE CHARGE WHICH RELATES TO THE PRESUMPTION CREATED BY THE STATUTE.

It is insisted that the trial court erred in charging the jury as follows:

In determining that question, you have a right to take into consideration all the evidence in the case. You have the right also to take into consideration the provisions of the statute which Congress has enacted in that regard, and upon that subject the statute is this: Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death, without consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title. By that statute Congress created a rule of evidence merely. That statute raises a presumption that if a transfer is made within two years of the death of the person making the transfer, it is presumed to have been made in contemplation of death, unless the contrary is shown; and the burden in this case is upon the plaintiff to establish by a fair preponderance of the evidence, taking into consideration the presumption which the statute creates, that

this transfer was not made by Mrs. Dickel in contemplation of her death. (R. 225.)

And again:

Take into consideration all of these matters and then say from the evidence in the case, bearing in mind the presumption which the statute raises and giving it the consideration to which it is entitled, and it is to be considered by you in connection with the other evidence in the case, whether or not that transfer by Mrs. Dickel to the Detroit Trust Company at that time was made by her in contemplation of her death. (R. 225.)

Plaintiff's contention appears to be that the jury should not have been permitted to take into consideration the presumption created by the statute at all, but that they should have been told that, evidence tending to show that the trust was not created by Mrs. Dickel in contemplation of death having been introduced, the presumption entirely disappeared; and that they should leave it entirely out of mind and render their verdict alone upon the evidence presented. It is difficult to conceive how the jury could reach a verdict in compliance with the statute and keep out of mind the presumption, or rather rule of evidence created by the statute. The statute declares that a transfer—

made by the decedent within two years prior to his death without such a consideration, shall, *unless shown to the contrary, be deemed* to have been made in contemplation of death within the meaning of this title.

That is, the statute declared what the state of mind of the jury should be when it was proven that Mrs. Dickel executed the instrument in question without consideration and within two years before her death. In other words, their judgment was required to be that the trust was created in contemplation of death, and before such judgment could be changed there had to be sufficient evidence introduced to show to the contrary. Unquestionably the statute required a weighing of the evidence to determine whether or not the contrary was shown; and how was it possible to keep out of view the very state of mind which was, under the statute, the starting point in their deliberations after the facts out of which the presumption arose were proven? Plaintiff's criticism is well answered in the opinion of the Circuit Court of Appeals, as follows:

The instruction that the "presumption" afforded by the *prima facie* clause of section 202b, which is referred to in subdivision (a) of the first division of this opinion, could be taken into account in determining the fact of "contemplation of death" was not erroneous. *R. R. Co. v. Landrigan*, 191 U. S. 461, 473-4. The provision in question raises a presumption of fact, not a presumption of law, and under well-settled rules a presumption of fact may be taken into account in determining the ultimate fact. The presumption is merely a rule of evidence whose enactment is within the legislative competency. *Mobile, etc., R. R. Co. v. Turnipseed*, 219 U. S. 35, 42. The very

object of a presumption of fact is to supply the place of facts. *Lincoln v. French*, 105 U. S. 614, 617. Of course, a presumption can never be allowed against ascertained and established facts. But unless the statutory presumption may properly be taken into account in determining the ultimate fact, it has no office. Elements which, in the absence of evidence to the contrary, are made sufficient to conclusively establish the ultimate fact, can not be said to have no evidentiary influence in reaching that conclusion (R. 246).

In the briefs filed for plaintiff in error there appear quotations from learned and philosophical treatises on the laws of evidence with which the court's charge may not be, from a highly technical standpoint, strictly in accord, but the distinction drawn is something that could not be comprehended by a jury. A presumption of this character created by statute is by some courts called a presumption of law (*Williams v. Culver*, 39 Ore. 337, 341); and by others called a presumption of fact (*Stockton, etc. Co. v. Houser*, 109 Cal. 9, and opinion of Court of Appeals above). But a difference in its designation does not change its effect. And it was settled by this court in *Coffin v. United States*, 156 U. S. 432, 458-460, that such a presumption is evidence, and that a court should so charge the jury.

The question there was whether or not it was error for the court to refuse to charge in a criminal case that innocence is presumed, when he had clearly and fully charged the jury that to warrant a convic-

tion it was necessary that the accused should be proven guilty beyond a reasonable doubt. The court held that the refusal to charge the request was reversible error. The court said:

Now, the presumption of innocence is a conclusion drawn by the law in favor of the citizen by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted unless he is proven to be guilty. In other words, *this presumption is an instrument of proof* created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created. This presumption, on the one hand, *supplemented by any other evidence he may adduce*, and the evidence against him, on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn.

Greenleaf thus states the doctrine: "As men do not generally violate the penal code, the law presumes every man innocent, but some men do transgress it, and therefore evidence is received to repel this presumption. This legal presumption of innocence is to be regarded by the jury, in every case, as matter of evidence, to the benefit of which the party is entitled." 1 Greenl. Ev. sec. 34.

Wills on Circumstantial Evidence says: "In the investigation and estimate of criminal evidence there is an antecedent *prima facie* presumption in favor of the innocence of the party accused, grounded in reason and

justice, not less than in humanity, and recognized in the judicial practice of all civilized nations; which presumption must prevail until it be destroyed by such an overpowering amount of legal evidence of guilt as is calculated to produce the opposite belief." Best on Presumptions declares the presumption of innocence to be a "*presumptio juris*." The same view is taken in the article in the Criminal Law Magazine for January, 1889, to which we have already referred. It says: "*This presumption is in the nature of evidence in his favor* [i. e. in favor of the accused], and a knowledge of it should be communicated to the jury. Accordingly, it is the duty of the judge in all jurisdictions, when requested, and in some when not requested, to explain it to the jury in his charge. The usual formula in which this doctrine is expressed, is that every man is presumed to be innocent until his guilt is proved beyond a reasonable doubt. The accused is entitled, if he so requests it * * * to have this rule of law expounded to the jury in this or in some equivalent form of expression."

The fact that the presumption of innocence is recognized as a presumption of law and is characterized by the civilians as a *presumptio juris*, demonstrates that *it is evidence in favor of the accused*. For in all systems of law legal presumptions are treated as evidence giving rise to resulting proof to the full extent of their legal efficiency;

Concluding, then, that the presumption of innocence is evidence in favor of the accused

introduced by the law in his behalf, let us consider what is "reasonable doubt." It is of necessity the condition of mind produced by the proof resulting from the evidence in the cause. It is the result of the proof, not the proof itself; *whereas the presumption of innocence is one of the instruments of proof*, going to bring about the proof, from which reasonable doubt arises; thus one is a cause, the other an effect. To say that the one is the equivalent of the other is therefore to say *that legal evidence* can be excluded from the jury, and that such exclusion may be cured by instructing them correctly in regard to the method by which they are required to reach their conclusion upon the proof actually before them. In other words, that the exclusion of *an important element of proof* can be justified by correctly instructing as to the proof admitted.

V.

THE TRIAL COURT DID NOT ERR IN ITS RULINGS UPON OBJECTIONS TO EVIDENCE.

But two of the questions raised relating to the introduction of evidence will be noticed.

(1) The admission of the evidence of nonpayment and nonassessment of personal property for taxes in Tennessee was clearly competent. The theory of the plaintiff throughout was that Mrs. Dickel moved to Michigan, and executed the trust deed, in order to avoid excessive taxes in Tennessee. The theory was that she executed the deed, not "in contemplation of death," but "in contemplation of taxes." Upon this

question it was certainly material to show that in fact she paid no taxes, or substantially none, in Tennessee. The plaintiff conceded this when evidence to that effect was elicited from Mr. Shwab, without any objection, on his cross-examination (R. 91). The subsequent evidence simply amplified the evidence thus received without objection.

With reference to this evidence the court charged the jury as follows:

There has been considerable testimony in this case concerning taxes upon property. That testimony has been admitted solely for the purpose of aiding you in determining the primary question as to whether this transfer was made in contemplation of death. We are not concerned otherwise with the question of taxation in Tennessee, or in Michigan, or with the question as to whether somebody has tried to evade the payment of his taxes. In that regard you should not be prejudiced either for or against the plaintiff. The testimony upon that subject has been admitted solely for the purpose of aiding you to determine whether this transfer was made in contemplation of death, and for no other purpose. (R. 169.)

For the purpose for which the evidence was admitted it was entirely proper.

(2) The cross examination of plaintiff concerning tax return made by him as executor was not error and not prejudicial.

It was not prejudicial, for the court did not submit to the jury the issue whether the transfer was to take

effect in possession or enjoyment at donor's death, the only issue to which such cross examination was addressed. It was not error, because it was cross examination and did not require or imply any previous inspection or examination of the return claimed to be confidential; because the information, if any, which prompted such cross examination, might have been (in fact in this case was) obtained without any inspection of the returns filed with the Government, but from another and unconfidential source entirely; because the privilege does not extend to the exclusion of cross examination thereon; because the return of 1915, sent from Washington, was certified by the Secretary of the Treasury, under the Seal of the Treasury Department (see Act September 8, 1916, ch. 463, No. 14(b), 39 St. 772).

In disposing of the exceptions taken to the action of the trial court with reference to the introduction of evidence, the Court of Appeals said:

We find no reversible error in either of the respects complained of. The witness Spicer was not shown competent to answer the question put to him. It was plainly incompetent for Mr. Shwab to state a fact which was for the ultimate conclusion of the jury, viz: whether Mrs. Dickel had any expectation that she was in danger of passing away in the near future. It was also plainly incompetent for the witness Hager to testify that he understood that Mrs. Shwab, Mr. Shwab and Mrs. Dickel made their wills together "so that they would not excite Mrs. Shwab." He apparently had no first-hand knowledge of the matter.

As to the inquiry of Mr. Shwab, on cross-examination, respecting the inclusion in Mrs. Dickel's income tax return of the first year's income under the trust deed: The court had already held that the income tax returns were not admissible. The question asked Mr. Shwab regarding the making of such return was objected to only as "immaterial." No exception was taken to the overruling of the objection. The subject was, in our opinion, material. He then testified, without objection, that the first year's income from the trust estate was included in that income tax return as part of Mrs. Dickel's income. It was only after the question had been substantially repeated that it was objected to as "incompetent, immaterial and irrelevant," but without statement of the ground of the asserted incompetency, and without motion to strike out the testimony already given. The objection was overruled, and the answer was substantially the same as before. The witness then testified at some length in explanation of an asserted mistake in making such inclusion. It is unnecessary, in our opinion, to determine whether the testimony in question was, for any reason, incompetent, for we think the objection on that score came too late. We do not intimate an opinion that it was incompetent. It was material to show that neither Mr. Shwab nor Mrs. Dickel had paid any taxes in Tennessee, or were liable to be required to so pay, in view of the fact that such liability had been put forward by plaintiff's counsel as the reason for making the trust deed in question. (R. 246-247.)

VI.

THE TRIAL COURT DID NOT ERR IN REFUSING TO DIRECT
A VERDICT IN FAVOR OF PLAINTIFF.

- (1) Whether a transfer is made in "contemplation of death" is a question of fact, and material and convincing evidence was introduced in support of defendant's contention that this transfer was made in contemplation of death.

It appears to be universally agreed that whether or not a transfer is made in contemplation of death is a question of fact.

Estate of Reynolds, 169 Cal. 600, 603.

Abstract and Title Guaranty Company v. State, 173 Cal. 691, 694.

Spreckels v. State, 30 Cal. App. 363, 368.

McDougald v. Wulzen, 34 Cal. App. 21, 23.

People v. Kelley, 218 Ill. 509, 514.

In re Estate of Benton, 234 Ill. 366, 370.

Conway's Estate v. State, 120 N. E. Rep. (App. Ct. of Ind.) 717, 719.

Then, the question to be considered is whether there was substantial evidence that the transfer of April, 1915, was made "in contemplation of death"; in other words, whether it constituted "gifts in life substituted for gifts by will" (*In re Reynold's Estate*, 169 Cal. 600; 147 Pac. Rep. 268). If it is a legitimate inference, from all of the evidence, that the transfer was of this character, the verdict must stand.

The barest outline of the evidence shows that the question was one for the jury.

The transfer was the gift of "a material portion," in fact of the greater part of the donor's property,

was made "within two years," less than one year and five months, prior to her death, and was "in the nature of a final disposition and distribution thereof." It was therefore within the evidential inferences and requirements of the Act.

Mrs. Dickel, the donor, was an old woman, "up in years," seventy-seven years old, "a childless widow," and stood almost in the relation of a parent to these nephews and nieces. She was of sedentary habits, stout in person, with a rheumatic knee, unable to walk or get out much, constipated, with occasional indigestion. She had "arterio sclerosis," a progressive disease of old age, with a usually fatal termination (R. 44-48). She died of apoplexy and ensuing paralysis, with "old age the contributing cause" (R. 53).

She recites in her deed of trust transferring this million dollars of bonds, "Whereas she desires to make a division of a part of her estate particularly described herein" (R. 180).

At that time Mrs. Dickel contemplated that her sister, Mrs. Shwab, might survive her, though Mrs. Shwab then, and from 1914, was and had been a paralytic, and her death thought to be impending; for as Mrs. Dickel stated to Lawyer Vertrees when she desired her will changed, "that instead of giving the property to her sister she desired to give it to Mr. Shwab" (or "Mannie" as she called him), "that he practically managed everything anyway, and his wife, should she survive her, would be annoyed by the children calling on her, and it was better for all

concerned that it be placed in his hands instead of hers" (R. 105).

The income was made payable to her brother-in-law, Victor E. Shwab, during his life. Not only was he a close business and personal friend, her brother-in-law, her alter ego in fact, but the gift was merely a means to the eventual enjoyment of the property by the nephews and nieces. This appears by her will, executed about a month after the trust deed, and before its final acceptance by the trustee, in which she leaves the entire residuary estate to Mr. Shwab, reciting the purpose just stated (R. 196-7). These nephews and nieces, her next of kin, the ultimate beneficiaries of the trust, were "the natural objects of her bounty," and if for any reason the trust failed or were revoked or otherwise terminated, the will would be operative upon the whole corpus of the trust. It is evident, both from the circumstances and the recital quoted, that the trust deed is a partial execution of the decedent's testamentary plan.

What other adequate purpose or motive was there? Certainly not the alleged one of the matter of taxation. For Mrs. Dickel had paid no taxes, either directly or indirectly, nor had Mr. Shwab for her, upon these bonds, nor was there the remotest reason to anticipate or fear any such taxation. She made the trust conveyance, incurred the considerable expense of the trusteeship, changed her residence to another State, paid the sum of \$5,000.00 in specific taxes to the State of Michigan, for some adequate

purpose and from some moving cause and motive. What was this, if not the desire, with the "contemplation of death" as the moving cause, to make "a final disposition and distribution thereof"; that is, to say, of this greater part of her property?

The plaintiff has a theory for the transfer which assigns to it other than a testamentary character; but this theory does not fit the entire case, and in truth will not bear scrutiny at all. It is, that the personal property tax in Tennessee, where the decedent originally resided, was excessive; that it was decided that she should avail herself of the more liberal laws of Michigan; and that the execution of the trust deed was part of this plan. The plaintiff, however, when pressed, was quite unable to show that the tax laws of Tennessee had been an embarrassment to the decedent. The only tax of any kind paid with reference to the property included in the trust deed was paid under an assessment to the firm of Geo. A. Dickel & Co., of which the decedent was a member. This assessment was for \$20,000, and covered all of the personalty of the firm, including its tangible property (R. 91, 123-5). The situation in this respect had not changed for years. Mr. Shwab was asked whether it was "getting more pressing" and replied: "Well, I guess not" (R. 127). His explanation was that "naturally, as time rolled on I gave that more thought" (R. 127).

This is very significant. Time was rolling on; the decedent was getting old; and this was concededly a factor in what was done. Mr. Vertrees, the attorney

who represented the decedent and Mr. Shwab throughout these transactions, testified:

Q. Mr. Vertrees, during the preparation of this trust deed and during that time you and Mr. Shwab were considering the matter of making the trust deposit with the Detroit Trust Co., throughout these negotiations it was understood, of course, and naturally entered your mind at the time, as well as in your conversations with Mr. Shwab, that Mrs. Dickel was an old woman?

A. Yes.

Q. And possibly could not live many years longer?

A. Reasonably could not be expected she would live many more years.

Q. And this was a wise precaution?

A. Yes, and I think, in fact, it is wise for anyone.

This brings us to the crux of the matter. The decedent's advanced and advancing age, admitted by Mr. Vertrees to have been under consideration, has a direct bearing upon the matter of inheritance taxation. So did the execution of the trust deed. It actually resulted in the exemption of the property embraced in it from taxation under the inheritance tax laws of Michigan (R. 122).

Did it have an equally important bearing upon the taxation of the property during the life of the decedent? The answer must certainly be no,—that in this connection it had no function to perform at all. The effort which Mr. Shwab was making, according

to his own account, was to obtain the advantage of a Michigan statute rendering secured debts tax-exempt upon payment of a certain percentage of their face value. Concededly Mrs. Dickel abandoned her residence in Tennessee, and acquired one in Michigan, in order to be in a position to avail herself of this statute. As soon as the matter was finally decided she bought a home in Michigan (R. 82, 126-7). This was regarded as essential in order to obtain the benefit of the statute (R. 90-95). There is an intimation in a letter from the Trust Company to Mr. Shwab that, if an absolute transfer were made to a trustee of the title to the property, the property might become subject to tax in the State where the trustee resided (R. 176). If this was intended as advice that the benefit of the Michigan secured debts law might be obtained without a change of domicile on the part of Mrs. Dickel (which is not clear), the advice was certainly not followed. The decedent did change her domicile, and with a direct view to taking advantage of the statute. Having done so, she obtained the desired privilege; and this was recognized (R. 97). Thus we find that the ostensible reason for this transfer of a large part of the decedent's estate wholly fails to account for what was done. The jury had a perfect right to find that it was a cover for some other purpose. They were also absolutely justified in finding that this other purpose, the real purpose, was the avoidance of inheritance taxes. Much is attempted to be made of the fact that the federal estate tax had not come into existence. This does not, however,

meet the difficulty with reference to taxation by the states.¹

Why, then, and what the significance of the investigation admittedly conducted by Mr. Shwab by and through correspondence and otherwise into the laws of the various States relating to the taxation of personal property in the States? It must have been known by Mr. Shwab and Mrs. Dickel, one or both, that as soon as Mrs. Dickel made a trust conveyance of these bonds, and created a trust therein, the trustee, whether resident in Tennessee or elsewhere, would be obliged to disclose and return such bonds, the subject of the trust, for taxation, unless some law in some State were found which provided otherwise. "Time was rolling on," and it was desired by Mr. Shwab, and doubtless by Mrs. Dickel as well, to make a trust conveyance of this large amount of bonds, either with or without the reservation of a life estate therein to her. The matter was "pressing," and it was therefore important and pressing to find the State whose tax laws were most favorable in this regard under the conditions as they would exist if and when the trust was created. Hence the inquiry, and hence the final selection of Michigan as the State whose laws were found to be most favorable in that regard.

There is still another vitally significant circumstance in the case. Mr. Vertrees had been over the matter of a trust deed with Mr. Shwab in 1914, and

¹ At this time the States of both Tennessee and Michigan imposed a 5 per cent inheritance tax upon property passing to collaterals. (Thompson's Shannon's Code, sec. 724; Howell's Mich. Stats. sec. 2022.)

had drawn a deed, which had been actually signed by Mrs. Dickel. By the terms of this instrument the income of the trust fund was reserved to her during her life (R. 90, 103, 205). In a letter to Mr. Shwab, written in June, 1914, Mr. Vertrees refers to this deed and says: "I came to the conclusion that it would be better to draw it on somewhat different lines from those we discussed, and I have done so" (R. 205). He proceeds to discuss certain details, such as the trustees, the power to remove them, etc. What he does not mention is why the reservation of income to the decedent was omitted in the new deed. As to this there is an air of mystery. Mr. Shwab was questioned on the subject, but his answers are very unsatisfactory. He says that the change "must have been upon her (Mrs. Dickel's) direction, she could do as she pleased about it" (R. 132). He says: "I may have talked to her about it at the time but I have forgotten" (R. 132). He next testifies:

Q. Did you talk with Mr. Vertrees about it?

A. The chances are I talked with them both, because Mrs. Dickel would hardly make a move without consulting me, and Mr. Vertrees has been my personal friend and attorney for many years (R. 132-3).

There is a strong air of disingenuousness about this testimony. Mr. Shwab managed Mrs. Dickel's affairs; and it is very clear that a suggestion on this head would have originated with him, not with her, as he first pretended. It is also very unlikely that

he did not remember. He was a highly intelligent witness, with a clear recollection of these transactions.

The significance of the change in the deed, and of Mr. Schwab's faulty recollection, is apparent when we consider that a transfer in which the grantor reserves to himself the income of the property during life is universally held to be a transfer "intended to take effect at or after death," and taxable under a statute embracing such transfers.

In re Moir's Estate, 207 Ill. 180.

People v. Kelley, 218 Ill. 509.

Crocker v. Shaw, 174 Mass. 266.

Douglas County v. Kountze, 84 Neb. 502.

In re Green's Estate, 153 N. Y. 223.

In re Cornell's Estate, 170 N. Y. 423.

Wright's Appeal, 38 Pa. St. 507.

In re Line's Estate, 155 Pa. St. 378.

The provision quoted is contained in the inheritance tax laws of both Tennessee and Michigan (Thompson's Shannon's Code, Sec. 724; Howell's Michigan Statutes, Sec. 2022). The trust deed first drawn and signed would thus have left the property subject to inheritance tax in either State, a result which was obviated by making the transfer absolute. We thus have an important addition to the evidence showing that the parties to these transactions had inheritance taxes in their minds, and a disposition to avoid them.

"Item 5" of the will is especially enlightening. In it she says:

I have a valuable estate and no near relatives other than my sister, Emma B. Shwab, and her children, and they are all dear to me. I wish them to receive and enjoy the benefit of my estate. My brother-in-law, Victor Emanuel Shwab, and I have long been jointly interested in business affairs and I have great confidence in his judgment. He and his wife, my sister, Emma, and I have caused the disposition of our estates and agreed as to what under all the circumstances will be best for those for whom it is our desire to provide. (R. 196.)

Was this mere fiction? Was it not rather an actual fact?

Accordingly and to that end I give and bequeath and will and devise all of my property not hereinbefore disposed of, of every kind and nature, wherever situated, real, personal and mixed, to my brother-in-law, Victor Emanuel Shwab, of Davidson County, Tennessee, absolutely. My sister will understand why I have bequeathed nothing to her. She has an abundance and well knows my affection for her, and that I have in contemplation that form of disposition of my estate which eventually will benefit those she loves dearly—the children of her union with her husband, Mr. Shwab (R. 196–197).

This will was dated May 26, 1915 (R. 197), while the trust agreement was dated April 21, 1915, was acknowledged by Mrs. Dickel April 22, 1915, and by the Trust Company June 3, 1915 (R. 179, 186,

187). Does this "form of disposition of my estate" "in contemplation" thus appealed to and accentuated as one "which will eventually benefit" the children, refer alone or principally to the will then being executed? Does it not refer equally—indeed more aptly and clearly—to the trust instrument to the Detroit Trust Co., an instrument then signed and acknowledged by her, but not accepted or binding, and in real fact "in contemplation"?

And is not the one equally with the other made "in contemplation of death" and as clearly testamentary in essential purpose, intent, and nature?

Moreover, while it is claimed by plaintiff that this will was executed at this time so as not to alarm Mrs. Shwab (who, it is said, it was thought should execute her will because of the state of her health), this claim hardly accounts for or satisfies the whole fact as shown by the record. For in fact, as appears from Mr. Vertrees' testimony, Mrs. Dickel then had a will and one made some little time before (R. 105), and she was "dissatisfied" either with that will or with the first draft of this last will made by Mr. Vertrees (R. 105); and in either event she desired a change made, and the character of that change is made clear by her to Mr. Vertrees, as is also her reason for such change (R. 105), and is most significant. Mr. Vertrees, after testifying that this last will of Mrs. Dickel was executed May 22, 1915 (R. 105), continues:

I recall with distinctness that at this time or shortly before, Mrs. Dickel came to the office and came alone and said with reference to her

will, that she wanted it changed, that instead of giving the property to her sister, she desired to give it to Mr. Shwab, or "Mannie" as she called him, stating that he practically managed everything anyway, and his wife, should she survive, would be annoyed by the children calling on her and it was better for all concerned that it was placed in his hands instead of hers. I recall distinctly her return to the office and her statement with reference to the change, but I am not distinct as to when that will had been made that she desired changed; whether it was one made some little time before, or whether it was the draft of the will sent out then to be executed, but I do recall with definiteness that conversation and the directions as to the change (R. 105).

And this state of mind of Mrs. Dickel and this desired change in her will and her reason therefor, so distinctly remembered and sworn to by Mr. Ver-trees, clearly shows that Mrs. Dickel was then (prior to May 22, 1915, when the last will was executed) contemplating death in the immediate or reasonably close future; and that that "expectation or anticipation of death" was a "moving cause," not only in making this last will, but in making the change in her former will, or in the first draft of this last will, or both, as the case may be. Mrs. Shwab was then and had been from 1914 a paralytic, whose death was thought to be impending almost from day to day. Does it not almost necessarily follow that Mrs. Dickel on April 22, 1915, when she executed and

acknowledged this trust instrument, likewise contemplated death and thought that her sister might survive her? And was not her expectation or anticipation of death the moving cause of the creation of this trust?

It is practically certain that the last will and testament of May 22, 1915, and the trust conveyance of April 22, 1915, were alike executed or made "in contemplation of death" within the meaning and intent of the Act of Congress; and that both alike were fruits of the testamentary mind and purpose and alike in testamentary nature. In any event it was a question for the jury upon the whole evidence to determine how that was.

The question whether the transfer was made "in contemplation of death" was not, of course, one which could be disposed of by direct evidence. It was an inference to be drawn from all the facts, and has always been so treated.

While no witness testified, and it was not stipulated that the transfers were made in contemplation of the death of Leonard B. Merrifield, the county court properly reached the conclusion from the admitted facts that the transfers were made by Leonard B. Merrifield in contemplation of death (*Merrifield's Estate v. State*, 212 Ill. 446).

The trial court inferred from the facts and circumstances of the case shown by the evidence that the conveyances under discussion were made in contemplation of the death of the grantor. While there is no direct evidence

warranting such inference, * * * it appears that the trial court may reasonably have drawn such inference (*Conway's Estate v. State*, 120 N. E. Rep. 717, 719).

The party succeeding upon this issue in the trial court is, of course, at an advantage in the appellate court. Sometimes it is the taxpayer (see *Spreckels v. State*, supra); sometimes the State (see *Reynolds* case, supra; *Abstract of Title Guaranty Co. v. State*, supra; *Merrifield* case, supra; *Benton* case, supra; *Conway* case, supra).

The *Conway* case is so closely in point that it warrants special mention. In that case the decedent, when 79 years of age, conveyed over 150 acres of land to his children. He said that he had "more than he could handle and he would make his children share part of the load; that his children were all working hard and that he was in a position to help them get ahead." The children, however, "were adults, prosperous and self-sustaining," so that the gift was not the result of a present need. The decedent had been "a strong rugged man," and "in good health both prior and subsequent to the execution of the deeds, except he suffered from rheumatism." He died a year and five days later, after an illness of only three or four days. The trial court found that the transfer was taxable, and the appellate court affirmed the judgment, saying:

The trial court inferred from the facts and circumstances of the case shown by the evidence that the conveyances under discussion

were made in contemplation of the death of the grantor. While there is no direct evidence warranting such inference, when the age, condition of health, statements, conduct, and surroundings of the decedent are considered in connection with the conveyances made by him, it appears that the trial court may reasonably have drawn such inference, though it may be said that other and contrary inferences may with equal, or greater, certainty be drawn from the facts and circumstances shown by the evidence (120 N. E. Rep. p. 719).

(2) **The statutory presumption.**

The presumption created by the statute was also an important element to be considered. The fact that a *prima facie* case was made out under the statute shows, of itself, that the question was one of fact, to be submitted to the jury.

There can be no doubt of the power of the legislature, in either a civil or criminal case, to enact that specified facts shall constitute *prima facie* evidence of a fact in issue, provided that the inference or presumption is not arbitrary and unreasonable.

Mobile, J. & K. C. R. R. Co. v. Turnipseed,
219 U. S. 35, 42.

State v. Thomas, 144 Ala. 77, 80.

Meadowcroft v. People, 163 Ill. 56.

State v. Beach, 147 Ind. 74, 80.

Holmes v. Hunt, 122 Mass. 505, 516-17.

State v. Buck, 120 Mo. 479, 490.

Board of Commissioners v. Merchant, 103
N. Y. 143, 148.

People v. Cannon, 139 N. Y. 32, 42-3.

Legislation providing that proof of one fact shall constitute *prima facie* evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, national and state, dealing with such methods of proof in both civil and criminal cases abound, and the decisions upholding them are numerous (*Mobile, J. & K. C. R. R. Co. v. Turnipseed*, 219 U. S. 42).

This power "is founded upon the jurisdiction of the legislature over rules of evidence both in civil and criminal cases" (*People v. Cannon*, 139 N. Y. 42). It is not unlimited:

The limitations are that the fact upon which the presumption is to rest must have some fair relation to, or natural connection with, the main fact. The inference of the existence of the main fact, because of the existence of the fact actually proved, must not be merely and purely arbitrary, or wholly unreasonable, unnatural or extraordinary (*Cannon case*, 139 N. Y. 43).

A proper exercise of the power, however, is a recognition, and, to a certain extent, a creation, of, evidential value in the facts specified; and the result is, that questions of this character, where the statutory condition is fulfilled, are at all stages of the case questions of fact.

Of course, the fact from which the presumption is to be drawn may exist without the existence of the main fact. That is true in all

cases. In other words, the two facts are not necessarily inseparable. * * * It (the statutory fact) is some evidence of the main fact, and the strength of it is properly a matter for legislative enactment in the first instance, subject to its submission to the jury for its deliberation and determination (*Cannon Case*, *supra*, 45).

There is no logical difference, in this respect, between statutory and common law presumptions. Where the common law raises a presumption from certain facts, proof of such facts necessitates the submission of the case to the jury on all the evidence. The *res ipsa loquitur* cases afford an illustration. In such cases "the question whether the defendant's explanatory evidence sufficiently rebuts the presumption is one of fact for the jury" (29 Cyc. 634). This court has directly applied this rule.

Rosenthal v. Walker, 111 U. S. 185.

In that case the issue was whether certain letters had been received by plaintiff in error. There was evidence that they were mailed, properly directed, but the plaintiff swore that he never received them. This issue was submitted to the jury, and was found against the plaintiff in error; and the finding was affirmed, the court saying:

The rule is well settled that if a letter properly directed is proved to have been either put into the post office or delivered to the postman, it is presumed, from the known course of business in the post office department, that it reached its destination at the

regular time, and was received by the person to whom it was addressed. * * * The rule and the authorities cited in support of it sustain the action of the court in admitting in evidence the copies of the letters, and in submitting to the jury the question whether the letters had been received to be decided upon all the testimony bearing upon the point (pp. 193-194).

It is obvious that the presumption with which we are dealing is not an arbitrary one, but a reasonable inference, drawn by Congress from facts having a probative value. These facts having been proved, it follows that the question was one for submission to the jury. The case is not like that of a presumption which does not have the nature of an inference of fact.

The plaintiff contends, and properly, that a presumption or inference cannot stand against direct, positive, uncontradicted evidence to the contrary. Thus an inference of authority to draw certain orders, sought to be deduced from the fact that similar orders had been honored, cannot stand against direct evidence that authority to draw the order in question was refused (*Fresh v. Wilson*, 16 Pet. 327, 331). Similarly, the presumption that a trustee has conveyed back the trust property to his grantors when the trust purpose became impossible of fulfillment cannot stand against direct evidence that there was no such reconveyance (*Lincoln v. French*, 105 U. S. 614, 617). This rule, however, applies only to a direct,

primary fact, not to an inference deducible from such facts. This is indicated in *Lincoln v. French*, where it is said: "But all presumptions as to matters of fact, capable of ocular or tangible proof, such as the execution of a deed, are in their nature disputable" (105 U. S. 617).

The rule also has application, though a limited one, to cases where the fact in issue is a matter of inference from evidentiary facts. Thus it has been held that the presumption of care, resulting from the instinct of self-preservation, disappears in the face of direct evidence of lack of care (*Wabash R. R. Co. v. DeTar*, 141 Fed. Rep. 932, 934). It was not, however, held in that case that the question of contributory negligence ceased to be a question of fact, but merely that it was erroneous to refuse to charge the jury that they must consider the evidence of lack of care, and, if they believed it, find for the defendant.

The case is radically different where the question at issue depends upon inferences to be drawn from the evidentiary facts. In this class of cases the better rule, established by the decided preponderance of authority, is, that where sufficient evidence is introduced to make out a *prima facie* case, such case, together with the attempted rebuttal, must be submitted to the jury.

McCullen v. Chicago & N. W. Ry. Co., 101 Fed. Rep. 66, 71—C. C. A., 8th Circuit.

Great Northern Ry. Co. v. Coats, 115 Fed. Rep. 452, 454-5—C. C. A., 8th Circuit.

Erickson v. Pennsylvania R. R. Co., 170 Fed. Rep. 572, 576—C. C. A., 3rd Circuit.

Hemmi v. C. & G. Ry. Co., 102 Ia. 25.

Atchison, T. & S. F. Ry. Co. v. Geiser, 68 Kans. 281.

Karsen v. Ry. Co., 29 Minn. 12.

In the *Erickson* case, *supra*, the court was considering a statute providing that railroad companies should "use all practicable means" to prevent fires, and should be liable for injury to property due to a violation of the statute; and that the communication of fire from an engine should be *prima facie* evidence of the violation of the statute. In reversing a nonsuit the court said:

There was admittedly proof that the fire, and therefore the injury, was communicated from an engine of the defendant. There was, therefore, *prima facie* evidence of violation by the defendant of the duty imposed upon it by the statute. That is, there was a presumption of negligence which the defendant must rebut, in order to relieve it therefrom. Whether it has done so, is clearly a question for the jury (170 Fed. Rep. 576).

In the *Coats* case, *supra*, the court was considering the common law presumption of negligence arising from the fact that a railroad company allowed combustible material to accumulate along its right of way, and the communication of fire thereto. It was said:

This presumption could only be overcome by testimony, and, unless we apply to this

class of cases a rule different from that which is applied in other cases, it was the province of the jury to determine the weight that should be accorded to the testimony which was introduced for that purpose, and also to determine the credibility of the witnesses who testified on that subject (115 Fed. Rep. 454-455).

There may possibly be exceptions to the foregoing rule. It has been said: "Unless the rebutting evidence as to both the facts and the inferences reasonably to be drawn from them is conclusive, the question is for the jury" (5 L. R. A. (N. S.), p. 106.). This we understand to be the basis of the decision in *Woodward v. Chicago, Milwaukee & St. Paul R. R. Co.* (145 Fed. Rep. 577—C. C. A., 8th Circuit). It is the only ground upon which the decision could properly rest, and the authority of the case is not beyond question. It is enough to say that the present case cannot possibly be brought within this category. We can not conceive of a case where it would be proper to take from the jury the question of the essentially testamentary character of a transfer after it had been shown that it embraced a material part of the decedent's estate, was in the nature of a final disposition or distribution, and was made without consideration and within two years of death. If the presumption arising from these circumstances can possibly be conclusively rebutted, it was certainly not done in the present case.

There has been some confusion on this subject on account of the use of the word "presumption," rather than "inference," with reference to questions of fact. When, however, the word "presumption" is used in the sense of "inference" rather than to describe a rule of substantive law, there is no doubt that the raising of the presumption indicates a question of fact. It has been said: "Presumptions are evidence, and sometimes * * * require clear and convincing evidence to overcome them" (*Hitchcock v. Rooney*, 175 Cal. 285, 289-290).

For the foregoing reasons the judgments of the District Court and the Circuit Court of Appeals should be affirmed.

JAMES M. BECK,
Solicitor General.

JAMES A. FOWLER,
Special Assistant to the Attorney General.
APRIL, 1922.





Counsel for Plaintiff in Error.

SHWAB, EXECUTOR OF DICKEL, v. DOYLE,
UNITED STATES COLLECTOR OF INTERNAL
REVENUE FOR THE FOURTH COLLECTION
DISTRICT OF MICHIGAN.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH
CIRCUIT.

No. 200. Argued April 17, 1922.—Decided May 1, 1922.

1. Laws are not to be considered as applying to cases that arose before their passage unless that intention be clearly expressed. P. 534.
 2. The Act of September 8, 1916, c. 463, § 202, 39 Stat. 777, imposed a tax on the transfer of the net estate of every decedent dying after its passage "to the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death," excepting *bona fide* sales for a fair consideration in money or money's worth, and further declared, that "any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death." Held, that the act does not apply to transactions consummated before its passage. P. 534.
 3. The reenactment of these provisions with an added provision that the transfer or trust should be taxed whether made before or after the passage of the act (February 24, 1919, c. 18, § 402 (c), 40 Stat. 1097) is not a construction of the earlier act as retroactive but the expression of a new purpose. P. 536.
 4. Tax measures are strictly construed. P. 536.
- 269 Fed. 321, reversed.

ERROR to a judgment of the Circuit Court of Appeals affirming a judgment for the defendant in error in an action to recover a sum exacted by him as an estate tax.

Mr. Willard F. Keeney and Mr. John J. Vertrees, with whom Mr. Julius H. Amberg, Mr. Roger C. Butterfield and Mr. William O. Vertrees were on the briefs, for plaintiff in error.

Mr. James A. Fowler, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for defendant in error.

The act is within the taxing power of Congress.

It plainly intends to cover transfers made before its passage.

The words "at any time" have often been construed and given a broad signification. *Appeal of Snyder*, 95 Pa. St. 174; *New Rochelle v. Clark*, 65 Hun, 140; *Raymond v. Wathen*, 142 Ind. 367; *Cohen v. Burgess*, 44 Ill. App. 206; *Slaughter v. Moore*, 2 Del. Ch. 350.

Statutes having a retroactive effect were familiar when this law was passed. See English Succession Duty Act of 1853, 16 and 17 Vict., c. 51, §§ 2, 10, as construed in *Wilcox v. Smith*, 4 Drew. 50; *Attorney General v. Fitzjohn*, 2 H. & N. 465; *Attorney General v. Lord Middleton*, 3 H. & N. 125; Succession Duty Act, passed by Congress in 1864, c. 173, §§ 126, 150, 13 Stat. 223, 287, 291, as construed in *Wright v. Blakeslee*, 101 U. S. 174; English Customs and Inland Revenue Act of 1881, 44 and 45 Vict., c. 12, § 38, subsec. (a), par. (a); 52 and 53 Vict., c. 7, § 11, subsec. (1), construed in *Attorney General v. Booth*, 63 L. J., Q. B. 356; *In re Foster*, 1 Ch. [1897] 484; *In re Beddington*, Ch. Div. [1900] 771; Finance Act of 1894, 57 and 58 Vict., c. 30; Finance Act of 1909-1910, Edw. VII, c. 8, § 59 (1).

A statute which clearly imposes a retroactive tax will be sustained. *Stockdale v. The Insurance Companies*, 20 Wall. 323, 331, 332; *Wright v. Blakeslee*, 101 U. S. 174, 176, 177; *Cahen v. Brewster*, 203 U. S. 543, 549; *Billings v. United States*, 232 U. S. 261; *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 20; *Chanler v. Kelsey*, 205 U. S. 466, 473, 479.

The insertion in the Act of 1919, 40 Stat. 1057-1097, of the specific provision requiring that transfers made in contemplation of death shall be included "whether such

529.

Opinion of the Court.

transfer or trust is made or created before or after the passage of this act," was intended as a legislative construction of the previous act, and was not intended to include a *casus omissus*. *United States v. Field*, 256 U. S. 257, and *Smietanka v. First Trust & Savings Bank*, 257 U. S. 602, do not apply, because the specific provisions of the later acts there construed were not embraced in the general provisions of the former act, while here the contrary is true. This case is governed by *Bailey v. Clark*, 21 Wall. 284, 288; *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 21; *Wetmore v. Markoe*, 196 U. S. 68, 77; *United States v. Coulby*, 251 Fed. 982, 985; *Matter of Reynolds Estate*, 169 Cal. 600.

The statute did not contemplate that a fraudulent motive to avoid the payment of taxes was necessary for the transfer to be taxable. Ross on Inheritance Taxes, § 111.

The phrase "in contemplation of death" does not refer exclusively to gifts *causa mortis*, nor alone to gifts made under the apprehension of death arising from some present disease or some other impending peril.

The court did not err in directing the jury to consider the presumption declared by the statute that the trust was created in contemplation of death if made within two years before the death.

Mr. Garret W. McEnerney, by leave of court, filed a brief as *amicus curiae*.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Augusta Dickel by a deed dated April 21, 1915, assigned and delivered to the Detroit Trust Company, stocks, bonds or securities of the declared value of \$1,000,000—with all their unmatured coupons, and the proceeds to be derived therefrom, both principal and income, in trust to invest and reinvest and to pay the net income for life to

Victor E. Shwab or on his written order. After his death the net income was directed to be paid to six beneficiaries, his children. A power of delegating and selling or exchanging all securities was given to Shwab, and of reinvestment. During the life of Shwab the net income was to be paid to him or his order. After his death the trust was to continue during the lives of the beneficiaries and the net income was to be paid to them during their respective lives in equal shares.

There were other rights and powers given to plaintiff and the beneficiaries not necessary to mention.

The trust deed was accepted by the Detroit Trust Company on or before June 3, 1915.

Augusta Dickel died September 16, 1916, possessed of an estate of \$800,000. Seven days before her death Congress passed an act entitled, "Estate Tax Act", 39 Stat. 777-780. The act provided that, according to certain percentages of the value of the net estate, a tax was to be imposed upon the transfer of the net estate of every decedent dying after the passage of the act, "to the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; . . ."

Under the assumption that the act was applicable to the deed made by Augusta Dickel to the Detroit Trust Company, a tax was assessed and exacted from plaintiff in error (here called plaintiff) in the sum of \$56,548.41.

Plaintiff paid it under protest and then to recover it brought this action in the District Court of the United States for the Western District of Michigan, Southern Division.

A jury being impaneled to try the case, the plaintiff presented his contentions in requests for charges. These were: (1) To find for plaintiff. (2) Upon refusal of the court to so charge but not otherwise, that the deed of Mrs. Dickel to the Detroit Trust Company took effect more than a year before the enactment of the Act of September 8, 1916, that is, took effect immediately, not in possession or enjoyment at or after the death of Mrs. Dickel. (3) The words "in contemplation of death" do not refer to that general expectation of death which every mortal entertains, but rather the apprehension which arises from some existing condition of body or some impending peril. (4) If Mrs. Dickel when she made the trust deed was not in that apprehension arising from that condition of body or of an impending peril, it was not made in contemplation of death within the meaning of the act of Congress. (5) Mrs. Dickel having made the deed before the act of Congress was passed, her purpose was not to defeat or evade the Federal Revenue Law.

There were other requests for instructions to the jury not material to be considered except that the act of Congress was not retrospective in character and, therefore, did not impose a tax on the deed from Mrs. Dickel to the Trust Company. And that if it could be considered to have that character and effect, it would be unconstitutional and void as a denial of due process of law, and the taking of private property for public use without just compensation, contrary to the Fifth Amendment of the Constitution of the United States.

The court ruled against all of the requests so far as the court considered them as presenting questions of law, but considered that whether the trust deed was made in con-

temptation of death was a question for the jury and submitted it to them, with aiding and defining explanations, and concluded by declaring, "the whole question is the question whether the transfer was made in contemplation of death; that is all there is to it."

The verdict of the jury was in favor of the defendant, upon which judgment was duly entered. It was affirmed by the Circuit Court of Appeals (269 Fed. 321), to the action of which this writ of error is directed.

Plaintiff urges against the judgment of the Circuit Court of Appeals all of the contentions presented in his requests made to the District Court for instructions to the jury, but so diverse and extensive consideration is only necessary if the act of Congress be of retrospective operation. To that proposition we shall, therefore, address our attention.

The initial admonition is that laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared. 1 Kent. 455; *Eidman v. Martinez*, 184 U. S. 578; *White v. United States*, 191 U. S. 545; *Gould v. Gould*, 245 U. S. 151; Story, Const., § 1398. The comment of Story is, "retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact."

There is absolute prohibition against them when their purpose is punitive; they then being denominated *ex post facto* laws. It is the sense of the situation that that which impels prohibition in such case exacts clearness of declaration when burdens are imposed upon completed and remote transactions, or consequences given to them of which there could have been no foresight or contemplation when they were designed and consummated.

The Act of September 8, 1916, is within the condemnation.

There is certainly in it no declaration of retroactivity, "clear, strong and imperative", which is the condition expressed in *United States v. Heth*, 3 Cranch, 398, 413; also *United States v. Burr*, 159 U. S. 78, 82-83.

If the absence of such determining declaration leaves to the statute a double sense, it is the command of the cases, that that which rejects retroactive operation must be selected.

The circumstances of this case impel to such selection. If retroactivity be accepted, what shall mark its limit? The Circuit Court of Appeals found the interrogation not troublesome. It said, "Congress would, we think, scarcely be impressed with a practical likelihood that a transfer made many years before a grantor's death (say 25 years, to use plaintiff's suggestion) would be judicially found to be made in contemplation of death under the legal definition applicable thereto, and without the aid of the two years *prima facie* provision." In other words, the sense of courts and juries, good or otherwise, might, against the words of the statute, and against what might be the evidence in the case, unhelpt by the presumption declared, fix the years of its retrospect. This would seem to make the difficulty or ease of proof a substitute for the condition which the statute makes necessary to the imposition of the tax, that is, the disposition with which the transfer is made; and certainly whether that disposition exist at an instant before death or years before death, it is a condition of the tax.

The construction of the Government is more tenable though more unrestrained. It accepted in bold consistency, at the oral argument, the challenge of twenty-five years, and a ruling of the Commissioner of Internal Revenue, in bolder confidence, extends the statute to "transfers of any kind made in contemplation of death at any time whatsoever [italics ours] prior to September 8, 1916." The sole test in the opinion of that officer is

"the date of the death of the decedent." He fixes no period to the retrospect he declares, but reserves, if he be taken at his word, the transfers of all times to the demands of revenue. In this there is much to allure an administrative officer. Indeed, its simplicity attracts anyone. It removes puzzle from construction and perplexity and pertinence on account of the distance of death from the transfer, risking no chances of courts or juries, in repugnance or revolt, taking liberties with the act to relieve from its exactions to satisfy the demands of revenue.

If Congress, however, had the purpose assigned by the Commissioner it should have declared it; when it had that purpose it did declare it. In the Revenue Act of 1918, 40 Stat. 1097, it reenacted § 202 of the Act of September 8, 1916, and provided that the transfer or trust should be taxed whether "made or created before or after the passage of" the act. And we cannot accept the explanation that this was an elucidation of the Act of 1916, and not an addition to it, as averred by defendant, but regard the Act of 1918 rather as a declaration of a new purpose; not the explanation of an old one. But granting the contention of the defendant has plausibility, it is to be remembered that we are dealing with a tax measure and whatever doubts exist must be resolved against it.

This we have seen is the declaration of the cases and this the basis of our decision, that is, has determined our judgment against the retroactive operation of the statute. There are adverse considerations and the Government has urged them all. To enter into a detail of them or of the cases cited to sustain them and of those cited to oppose them, either directly or in tendency, and the examples of the States for and against them, would extend this opinion to repellent length. We need only say that we have given careful consideration to the opposing argument and cases, and a careful study of the text of the act of Congress, and have resolved that it should be not construed to apply to

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Counsel for Parties.

transactions completed when the act became a law. And this, we repeat, is in accord with principle and authority. It is the proclamation of both that a statute should not be given a retrospective operation unless its words make that imperative and this cannot be said of the words of the Act of September 8, 1916.

Judgment reversed.
